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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 535

UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, *Petitioner*,

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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INDEX

	Page
OPINIONS BELOW	1
JURISDICTION	2
QUESTION PRESENTED	2
STATUTE INVOLVED	2
STATEMENT	3
REASONS FOR GRANTING THE WRIT	7
CONCLUSION	14

AUTHORITIES CITED

CASES:

Art Metals Construction Co. v. N.L.R.B., 110 F. 2d 148 (C.A. 2)	8, 11
Communications Workers v. N.L.R.B., 362 U.S. 479	7
Consolidated Edison Co. v. N.L.R.B., 305 U.S. 197	7
Local 60, Carpenters v. N.L.R.B., 365 U.S. 651	4, 7, 10, 11
Local 357, Teamsters v. N.L.R.B., 365 U.S. 667	6
Marley Co., 117 NLRB 107	11, 12
Mechanical Handling Systems, 122 NLRB 396, enforced, 273 F. 2d 699 (C.A. 7), reversed as to the refund provision of the order, 365 U.S. 651	12
Millwrights Local 2232, 122 NLRB 300, enforced as modified, 277 F. 2d 217 (C.A. 5), cert. denied, 366 U.S. 908	12
Mountain Pacific Chapter, 119 NLRB 883	6
N.L.R.B. v. Crompton-Highland Mills, Inc., 337 U.S. 217	8, 10
N.L.R.B. v. District 50, UMW, 355 U.S. 453	7, 8
N.L.R.B. v. Express Publishing Co., 312 U.S. 426	7
N.L.R.B. v. Falk Corp., 308 U.S. 453	8
N.L.R.B. v. Insurance Agents' International Union, 361 U.S. 477	13
Republic Steel Corp. v. N.L.R.B., 311 U.S. 7	7

STATUTES:

National Labor Relations Act, as amended, 61 Stat. 136, 29 U.S.C., Secs. 151, et seq.	2
28 U.S.C. § 1254(1)	2

MISCELLANEOUS:

Directory of National and International Labor Unions in the United States, 1961, Bull. No. 1320, Dept. of Lab., Bur. Lab. Stat., 17 (1962)	9

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NATIONAL LABOR RELATIONS BOARD, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

United Brotherhood of Carpenters and Joiners of America prays that a writ of certiorari issue to review the decree of the United States Court of Appeals for the Ninth Circuit entered in the above-entitled case on August 6, 1963.

OPINIONS BELOW

The opinion of the Court of Appeals is not yet reported (*infra*, pp. 5a-10a). The original decision and order of the National Labor Relations Board are reported at 130 NLRB 307 (R. 112-120, 76-94, *infra*,

pp. 11a-52a), and its supplemental decision and order are reported at 133 NLRB 358 (R. 121-125, *infra*, pp. 54a-59a).

JURISDICTION

The decree of the Court of Appeals was entered on August 6, 1963 (*infra*, pp. 1a-4a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether the National Labor Relations Board is empowered to order a labor organization to publish in its monthly journal circulated among its 750,000 members a notice that it will not engage in an unfair labor practice where (1) the unfair labor practice upon which the notice is based was terminated eight months before the complaint issued, (2) the termination took place in circumstances of contemporary widespread publicity, (3) virtually none of the 750,000 members among whom the notice is circulated felt any effect of the unfair labor practice which requires dissipation, and (4) the notice can be expected to mislead the 750,000 members into mistakenly believing that the agreements under which they are currently working are unlawful.

STATUTE INVOLVED

Section 10(c) of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C., Secs. 151, *et seq.*), empowers the Board, upon a finding that an unfair labor practice has been committed, to enter an order "requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act. . . ."

STATEMENT

Refinery Engineering Company is in the business of designing and constructing refinery units, chemical plants, and other heavy industrial structures (R. 77, G. C. ex. 8, p. 3). Beginning in 1957, it was engaged in the construction of an oil refinery plant at Laurel, Montana, near Billings (R. 77).

On May 4, 1956, the Company had entered into an agreement with petitioner United Brotherhood "to recognize the jurisdiction claims of the United Brotherhood of Carpenters and Joiners of America, to work the hours, pay the wages and abide by the rules and regulations established or agreed upon by the United Brotherhood of Carpenters and Joiners of America of the locality in which any work of our company is being done, and employ members of the United Brotherhood of Carpenters and Joiners" (R. 74). The by-laws and trade rules of Billings Local 1172 of United Brotherhood adopted on November 9, 1954 (R. 22), together with a two-year agreement that local had entered into on March 14, 1956 with an employer group representing building contractors in or near Billings (R. 24, 77), had restricted employment to union members (R. 80).

On August 20, 1958, United Brotherhood and the Company entered into a new agreement which superseded the old, and the legality of the new agreement is unquestioned (R. 75, 78, *infra*, pp. 8a, 15a). Furthermore, on May 21, 1958, Billings Local 1172 and the employer group entered into a new collective bargaining agreement which eliminated the restriction on employment to union members (R. 31, 32-33). Finally, revised on February 25, 1958 and approved on November 3, 1958, the local union also amended its by-laws and trade rules to delete the former requirement that

"a non-union man [who] comes on the job may be permitted to work providing he gives a cash guarantee that he will join the Local Union" (R. 23).

Entry into the new agreement between United Brotherhood and the Company and supersedure of the old occurred in the following circumstances: On February 7, 1958, the then General Counsel of the Board wrote to the President of the Building and Construction Trades Department, AFL-CIO, informing him that, unless "illegal hiring arrangements" were corrected by June 1, 1958, refund of union dues and initiation fees would be sought as a consequence of the continuance of the arrangement (R. 86-87). Thereafter, the moratorium for application of the refund remedy was extended to November 1, 1958, for those employers and unions who were actively engaged in reformulating their hiring practices before September 1, 1958 (R. 87-88).[1] This moratorium period was "widely publicized" (R. 115, 90, *infra*, pp. 47a, 36a); in the words of the Company's Industrial Relations Director, "we, like everyone in the construction industry, were cognizant of the opinion handed down by the General Counsel . . ." (G. C. ex. 8, p. 21).

On April 21, 1958, after announcement of the General Counsel's policy, the Company's Industrial Relations Director wrote to the President of United Brotherhood (G.C. ex. 20 (ex. A)). The letter stated that while "We did not believe that the wording in our agreement with your International Union was in violation of the National Labor Relations Act", a contrary

[1] Blanket application of the refund remedy was subsequently invalidated by this Court in *Local 60, Carpenters* v. *N.L.R.B.*, 365 U.S. 651.

opinion had been expressed by the Nineteenth Region of the National Labor Relations Board, and accordingly "we find it necessary to terminate this agreement as of this date" (*ibid.*) The letter invited entry into a new agreement in conformity with the National Labor Relations Act (*ibid.*). Termination of the old agreement was prompted by the General Counsel's warning of application of the refund remedy (G.C. ex. 8, pp. 21-22). In reply, the president of United Brotherhood wrote that, upon receipt of the General Counsel's "directive," counsel had been assigned "to make recommendations on the necessary changes required in our International Agreement", and upon completion of an approved revision copies would be distributed to all contracting firms (G.C. ex. 20 (ex. B)). Thereafter, on August 20, 1958; the new agreement was executed, United Brotherhood expressing its confidence that it "fully satisfies the requirements of the law . . ." (R. 75, G.C. ex. 20 (exs. E-2, F, G)).

On April 30, 1959, more than eight months after the new agreement had been entered into and the old agreement had in consequence been definitively terminated, the General Counsel issued a complaint alleging in part that during its former continuance the old agreement had invalidly restricted employment to union members (R. 6-13). On February 16, 1961, more than 21 months after issuance of the complaint, the Board found that United Brotherhood had maintained a "closed shop contract with the Company during the period in question" in violation of Section 8(b)(2) and (1)(A) of the Act (R. 113, *infra*, p. 44a). The Board also found that another agreement, which had been terminated one year before the complaint had issued (R. 79, 115, *infra*, pp. 17a, 47a), to which United

Brotherhood, Montana State Council of United Brotherhood, Billings Local 1172, and a state-wide employer group were parties, was invalid because during its former continuance it had established a hiring hall but "contained none of the hiring hall safeguard provisions set out by the Board in *Mountain Pacific* [119 NLRB 883]." (R. 115, 113, *infra*, pp. 47a, 44a).

Thereafter, on April 17, 1961, this Court disapproved the rule of *Mountain Pacific*, holding that compulsory incorporation of protective provisions in a hiring hall agreement was "a legislative Act" beyond the Board's power to impose. *Local 357, Teamsters* v. *N.L.R.B.*, 365 U.S. 667. Five months later, on September 26, 1961, by reason of this Court's intervening decision, the Board dismissed the complaint "insofar as it alleges the existence of an unlawful hiring hall arrangement and practice" (R. 123, *infra*, p. 57a), but reaffirmed its decision "having to do with the illegal closed shop contract existing between the Company and the Respondent Brotherhood . . . , and the remedy already ordered in that connection" (R. 122, *infra*, p. 55a). Accordingly, the Board ordered United Brotherhood (1) to cease from executing, performing, maintaining or otherwise giving effect to provisions of any agreement or understanding with the Company, or with any other employer, which conditions employment on union membership except as permitted by law, and from engaging in any like or related activity; (2) to post notices to that effect at its offices, and, the Company willing, at places where Company notices are customarily posted; and (3) *to publish the notice "in its official publications of general circulation among members . . . in the next succeeding issue of publications normally issued by it and distributed among its*

membership" (R. 122-123, *infra*, pp. 56a-57a, emphasis supplied). In dissent, Member Gerald A. Brown observed that (R. 122, n. 3, *infra*, p. 55a):

> Member Brown would dismiss the entire case for the following reasons: The Supreme Court's aforementioned decision has removed the principal theory upon which this case was tried, and the only remaining aspect of the original case concerns the alleged invalidity of a contract which was superseded in or before August 1958 during the "moratorium" period mentioned by the Trial Examiner. There is no showing of individual discrimination during the operative period of the contract, nor is there any claim of discrimination since the contract was superseded. Upon consideration of these circumstances, and wholly apart from reservations that the disputed contract is unlawful (see Member Murdock's dissenting opinion in *Marley Company*, 117 NLRB 107, 119-122), Member Brown considers further proceedings unwarranted.

The court below enforced the Board's order, specifically approving the requirement that United Brotherhood publish a notice of the order at least once in its publication generally distributed to its members (*infra*, pp. 9a-10a).

REASONS FOR GRANTING THE WRIT

This is another in the continuing series of cases in which it is necessary for this Court to recall to the Board the limitations upon its authority and discretion in its exercise of remedial power.[2] In this case the

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[2] *E.g., Local 60, Carpenters* v. *N.L.R.B.*, 365 U.S. 651; *Communications Workers* v. *N.L.R.B.*, 362 U.S. 479; *N.L.R.B.* v. *District 50, UMW*, 355 U.S. 453; *N.L.R.B.* v. *Express Publishing Co.*, 312 U.S. 426; *Republic Steel Corp.* v. *N.L.R.B.*, 311 U.S. 7; *Consolidated Edison Co.* v. *N.L.R.B.*, 305 U.S. 197, 236.

excess pertains to the requirement that United Brotherhood publish once in its monthly journal distributed to its members notice that "WE WILL NOT enter into, maintain or enforce any contract, agreement, understanding, or practice with THE REFINERY ENGINEERING COMPANY, or any other employer . . . , which unlawfully conditions" employment on union membership, or engage in any like or related activity (*infra*, pp. 58a-59a).

The purpose of notice is to convey to the employees assurance that they will be free in the future from the kind of past activity found by the Board to be unlawful.[3] Overwhelmingly, dissemination takes the form of, and is sufficiently served by, posting notices in conspicuous places, including all places where notices to employees are customarily displayed, in the locale where the unfair labor practice occurred. Infrequently notice-posting is supplemented by requiring publication in a newspaper. Sometimes justification lacks for any notice at all.[4] In this, as in other areas where the Board orders desistance or affirmative action, the Board's power "is contained by the requirement that the remedy shall be 'appropriate' . . . , and shall be adapted to the situation which calls for redress' . . . ."[5] In this case, the Board oversteps the limitation upon its power, because publication of the notice in the monthly journal is not only totally unnecessary but positively harmful; it serves punitive, not remedial, purposes.

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[3] *N.L.R.B. v. Falk Corp.*, 308 U.S. 453, 462; *Art Metals Construction Co. v. N.L.R.B.*, 110 F.2d 148, 151 (C.A. 2).

[4] *N.L.R.B. v. Crompton-Highland Mills, Inc.*, 337 U.S. 217, 226.

[5] *N.L.R.B. v. District 50, UMW*, 355 U.S. 453, 458.

1. United Brotherhood's official monthly journal, *The Carpenter* (R. 73, Sec. 44A, p. 36), has a nationwide circulation among the approximately 750,000 members to whom it is distributed.[6] The Board thus requires nationwide publication of the notice. Yet the unfair labor practice upon which so pervasive a disclaimer is enjoined ceased to exist at least eight months before the complaint even issued (*supra*, p. 5). And the Board's order compelling publication was not finalized until more than three years after the event to which it was addressed had passed into history (*supra*, p. 6). It is now more than five years.

Not only is the publication order based on an unfair labor practice which is stale, the act had ceased in circumstances where its termination had in fact been broadly and contemporaneously heralded. It had been ended as part of the General Counsel's "widely publicized" drive to coerce compliance with union security and hiring arrangements deemed valid by the agency; in the words of the Company's Industrial Relations Director, "we, like everyone in the construction industry, were cognizant of the opinion handed down by the then General Counsel . . ." (*supra*, p. 4). Thus, if any publicity were necessary to give assurance to the employees against a closed shop, such assurance had been prominently, contemporaneously, and vehemently conveyed. The Board's belated requirement of nationwide publication in the monthly journal ignites in comparison a pale spark long after the rocket had glaringly burst.

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[6] The membership is reported as 800,000 in Directory of National and International Labor Unions in the United States, 1961, Bull. No. 1320, Dept. of Lab., Bur. Lab. Stat., 17 (1962).

Finally, it is union members among whom the journal circulates, and the premise of publishing the notice in the magazine distributed to them is necessarily that the unfair labor practice exerted an effect upon them which needs to be dispelled. In the building and construction industry this premise is fanciful. Long-standing and voluntary union membership is traditional in the industry. Union membership is indeed so natural an attribute of the craftsman in the building trades that what would be unnatural to him would be the thought of relinquishing it. And the union member would regard a system of employment based on membership as a service to him rather than coercive of him. Thus, to require publication of a notice in a magazine circulated among this class of union members exclusively, a class "[w]here no membership in the union was shown to be influenced or compelled by reason of any unfair practice" (*Local 60, Carpenters* v. *N.L.R.B.*, 365 U.S. 651, 655), is to seek to dispel what was never instilled by the wrong found by the Board. In a word, "no 'dissipation' of the effects of the prohibited action is achieved." *Ibid.*

In sum, the publication order is based on an antiquated event; the event ended in circumstances of widespread contemporaneous publicity; and virtually none of the union members among whom the journal circulates felt any effect which requires dissipation. In these circumstances, there is "little, if any, need for orders requiring . . . the posting of any notices" (*N.L.R.B.* v. *Crompton-Highland Mills, Inc.*, 337 U.S. 217, 226); and whatever need does exist is fully satisfied by the uncontested requirement that United Brotherhood post notices "in all places where notices to members are customarily displayed in its offices," as

well as by posting; the Company willing, in places where notices to the Company's employees are customarily posted (*infra*, pp. 2a-3a). The additional requirement of nationwide publication of the notice in the journal bears no genuine relation to a realistic need or capacity to dissipate any palpable effect of the stale and finished unfair labor practice. The requirement can only be explained by a wish to make petitioner smart for having ever engaged in the act, and to compel a public proclamation of *mea culpa*. What the Board would thus compel, and the court below permit, is foreign to "too long a history, and too dearly bought privileges," to allow. L. Hand, J., in *Art Metals Construction Co.* v. *N.L.R.B.*, 110 F.2d 148, 151 (C.A. 2). "The order in those circumstances becomes punitive and beyond the power of the Board." *Local 60; Carpenters* v. *N.L.R.B.*, 365 U.S. 651, 655.

2. Citing three cases to show like activity, the court below stated that the conduct here was "not an isolated instance of this type" but had happened "on several occasions," and on this basis justified publication in the journal (*infra*, p. 10a). But, from the 1947 amendments of the Act creating unfair labor practices by unions through the Board's final decision in this case, fourteen years had elapsed. To show three previous instances of like conduct in the space of fourteen years is to demonstrate, not proclivity to wrong, but absence of significant manifestation of it. And particularized analysis of the three previous instances confirms the lack of any meaningful incidence of misconduct. In *Marley Co.*,[7] the Board by a divided vote held for the first time that the prototype of the international agreement present in this case was invalid. The agreement,

[7] 117 NLRB 107.

however, was not found to be invalid on its face (117 NLRB at 129); rather, by incorporating "the rules and regulations established or agreed upon by the . . . [local union] of the locality," the agreement was found invalid solely to the extent that the local rules it adopted happened to be invalid (*id.* at 108-109). In *Mechanical Handling Systems*,[8] United Brotherhood filed no exceptions to the finding that its international agreement was illegal by virtue of incorporation of invalid local rules,[9] thus acquiescing in the Board's decision in *Marley*. In the third case, *Millwrights Local 2232*,[10] there was no international agreement in the picture at all. Thus, of the three cases, one adjudicated the invalidity of the international agreement, the second showed acquiescence in the determination, and the third is irrelevant. This hardly adds up to a showing even plausibly sufficient to require circulation of a disclaimer among 750,000 members.

3. Not only is publication in the journal quite pointless, it is positively harmful. Although meant for workers' eyes, the notice is written by lawyers in the language of lawyers, and the qualifications in it which may be clear enough to the lawyer are altogether lost on the worker. And so the carpenter who reads the notice can be expected to believe that the notice pertains to a current state of affairs and that there is hence something wrong with the agreement under which he is presently working. He is hardly equal to

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[8] 122 NLRB 396, enforced, 273 F.2d 699 (C.A. 7), reversed as to the refund provision of the order, 365 U.S. 651.

[9] *Id.* at 399.

[10] 122 NLRB 300, enforced as modified, 277 F.2d 217 (C.A. 5), cert. denied, 366 U.S. 908.

the "'feat of mental pole vaulting'" [11] necessary to relate a notice published in 1963 to a defunct agreement definitively superseded in 1958. As a result, based on his natural belief that the notice has contemporary significance rather than being a lesson in ancient history, the worker will be assaulted by doubts concerning perfectly lawful current agreements, and will require assurance, not that his rights under the law will be respected, but that his rights under the agreement are intact. It effectuates no policy of the Act to create confusion and unrest among 750,000 members based on a dead agreement.

4. It is easy to say, as doubtless the Board will say, that the petition puts into issue the rightness of a particular decision but presents no question of general importance. But that is too easy. The circumstances under which a labor organization can be required to circulate a notice among its entire membership is a question of general importance in the administration of the Act. While it is too much to say that the Board can never require it, surely the situation must be very exceptional to allow it, and the function of this case is to fix the standard for governing this significant aspect of the Board's power. The case therefore merits this Court's consideration.

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[11] *N.L.R.B.* v. *Insurance Agents' International Union*, 361 U.S. 477, 481, n. 4.

CONCLUSION

For the reasons stated this petition for a writ of certiorari should be granted.

Respectfully submitted,

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October 1963.

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 18340

NATIONAL LABOR RELATIONS BOARD, *Petitioner,*

v.

UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, *Respondent.*

DECREE

Before: Jertberg, Circuit Judge, Madden, Judge of the Court of Claims and Duniway, Circuit Judge.

THIS CAUSE came on to be heard upon the petition of the National Labor Relations Board for the enforcement of a certain order issued by it against the Respondent, its officers, agents, representatives, successors and assigns, on September 26, 1961. The Court heard argument of respective counsel on June 6, 1963, and has considered the briefs and transcript of record filed in this cause. On July 15, 1963, the Court being fully advised in the premises, handed down its decision granting enforcement of the Board's order. In conformity therewith, it is hereby,

ORDERED, ADJUDGED AND DECREED by the United States Court of Appeals for the Ninth Circuit that United Brotherhood of Carpenters and Joiners of America, its officers, agents, representatives, successors and assigns shall:

A. Cease and desist from:

(1) Executing, performing, mainfaining or otherwise giving effect to provisions of any agreement or understanding with The Refinery Engineering Company, or with any other employer whose operations affect commerce within the meaning of the National Labor Relations Act, (hereinafter called the Act) which conditions the hire of employees

or the retention of their employment upon membership in the Respondent Union except to the extent that membership therein as the condition of continuing in employment may be required on or after 30 days by an agreement permitted by the proviso to Section 8(a)(3) of the Act, as modified by the Labor Management Reporting and Disclosure Act of 1959.

(2) In any like or related manner, restraining or coercing employees in the exercise of their rights guaranteed by Section 7 of the Act, except as authorized by Section 8(a)(3) of the Act as amended.

B. Take the following affirmative action which the Board has found will effectuate the policies of the Act:

(1) Post at its offices in all locations where notices to members are customarily posted, and publish in its official publications of general circulation among members, copies of the notice hereto attached marked Appendix. Copies of said notice, to be furnished by the Regional Director for the Nineteenth Region of the National Labor Relations Board (Seattle, Washington) shall, after being duly signed by representatives of Respondent, be posted by it immediately upon receipt thereof and conspicuously maintained by it for a period of sixty (60) consecutive days thereafter in all places where notices to members are customarily displayed in its offices. Reasonable steps shall be taken by the Respondent to insure that said notice is not altered, defaced, or covered by other material. Also the said notice after having been duly signed as directed above, shall be published by the Respondent in the next succeeding issue of publications normally issued by it and distributed generally among its membership.

(2) Additional copies of the said notice herein marked Appendix, to be furnished by the said Regional Director, shall be signed by a representative of the Respondent and forthwith returned to the aforesaid Regional Director. These notices shall be posted—Refinery [illegible]illing—in places

where notices to employees of Refinery, covered by Respondent's contract found herein to have exceeded lawful union security provisions, are customarily posted.

(3) Notify the said Regional Director in writing within ten (10) days from the date of this Decree what steps have been taken in compliance.

Endorsed, Decree Filed and Entered

/s/ Frank H. Schmid
Frank H. Schmid
Clerk

A True Copy,
Attest:
Frank H. Schmid
Clerk

APPENDIX

To All Members of United Brotherhood of Carpenters and Joiners of America

Pursuant to

A Decree of the United States Court of Appeals enforcing an order of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, we hereby notify our members that:

WE WILL NOT enter into, maintain or enforce any contract, agreement, understanding, or practice with THE REFINERY ENGINEERING COMPANY, or any other employer over whom the Board will assert jurisdiction, which unlawfully conditions the hire of applicants for employment or retention of employees in employment by such employer upon clearance or approval by us, except to the extent that membership as the condition of continuing in employment may be required on or after 30 days by an agreement permitted by the proviso to Section 8(a)(3) of the Act, as modified by the Labor Management Reporting and Disclosure Act of 1959.

WE WILL NOT in any like or related manner restrain or coerce employees of THE REFINERY ENGINEERING COMPANY, or any other employer, in the exercise of rights guaranteed in Section 7 of the Act, except as authorized by Section 8(a)(3) of the Act as amended.

Signed copies of this notice have been mailed to the National Labor Relations Board's Regional Director for the Nineteenth Region for posting by The Refinery Engineering Company, the said employer willing, in all locations where notices to their employees are customarily posted.

United Brotherhood of Carpenters and Joiners of America

Dated

By

(Representative) (Title)

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 18,340

NATIONAL LABOR RELATIONS BOARD, *Petitioner,*

v.

UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, *Respondent.*

July 15, 1963

On Petition for Enforcement of an Order of the National Labor Relations Board

Before: JERTBERG, Circuit Judge, MADDEN, Judge of the Court of Claims, and DUNIWAY, Circuit Judge.

MADDEN, Judge:

Pursuant to Section 10 (e) of the National Labor Relations Act, as amended [29 U.S.C. Sec. 160 (e)], the National Labor Relations Board has petitioned this Court for enforcement of its Supplemental Decision and Order issued against United Brotherhood of Carpenters and Joiners of America on September 26, 1961, in Case No. 19-CB-530. This Court has jurisdiction since the unfair labor practices which were the basis for said Order occurred at or near Laurel, Montana, within this judicial circuit.

The National Labor Relations Board (hereinafter referred to as Board) found that the United Brotherhood of Carpenters and Joiners of America (hereinafter referred to as Union) has maintained an illegal closed shop contract with The Refinery Engineering Company (hereafter referred to as Company) during the six month period prior to the filing of charges in this matter. The Board ordered Union to cease and desist from performing, maintaining or enforcing any agreement or understanding with the Com-

pany, or any other employer, which requires union membership as a condition of employment, except as authorized by Section 8(a)(3) of the National Labor Relations Act, as modified by the Labor Management Report and Disclosure Act of 1959; and from in any like or related manner restraining employees in the exercise of their rights guaranteed by Section 7 of said Act. The Order further provided that Union post appropriate notices in all locations where notices to its members are customarily posted, and if Company agrees thereto, in places where Company customarily posts notices to the employees covered by the contract between the Company and Union. Union was also directed to publish the notice once in its publications generally distributed to its membership.

Union resists the enforcement of the Board's Order on two asserted grounds: (1) The Board's finding that the Union maintained agreements containing closed shop provisions is not supported by substantial evidence on the record considered as a whole; and (2) In any event, the remedy proposed by the Board is arbitrary, unreasonable, and not appropriate to the unfair labor practice found by it.

As to the first of these objections, Section 10(e) of the National Labor Relations Act provides: "The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive."

From an inspection of the record it appears that there is substantial evidence in the record to support the findings of the Board. On May 5, 1956, Union entered into a written agreement entitled "International Agreement" with Company which contained the following provision:

> "We, the firm of The Refinery Engineering Company, agree to recognize the jurisdiction claims of the United Brotherhood of Carpenters and Joiners of America, to work the hours, pay the wages and abide

by the rules and regulations established or agreed upon by the United Brotherhood of Carpenters and Joiners of America of the locality in which any work of our company is being done, and employ members of the United Brotherhood of Carpenters and Joiners."

This agreement between Union and Company was in effect during the six months' period preceding the filing of the instant charge against Union on April 14, 1958, by a worker employed by Company on a construction project at or near Laurel, Montana. At the same time, Billings Local 1172 of the United Brotherhood of Carpenters and Joiners of America (hereinafter referred to as Local 1172) maintained an agreement with Billings Contractors Council, Inc., the local employers' group, which provided:

"The party of the first part [Billings Contractors] hereby agrees to employ such members of the party of the second part [Local 1172] who are in good standing with the party of the second part, or who shall signify their intentions to become members and make application for membership. Party of the second part agrees to hold employers harmless against any loss which may accrue to them in any manner through the operation of this paragraph.

"* * *

"ARTICLE IV

"There shall be a shop Steward appointed by the party of the second part, and it shall be the duty of the Shop Steward to see that only members of the party of the second part are in good standing and in the case of accident the job Steward shall see that the injured person or persons shall be promptly taken care of, and report any and all violations of this agreement to both parties interested."

Article X of the "By-Laws and Trade Rules" of Local 1172 then in effect provided, *inter alia*, that a non-union man may be permitted on the job if he gives a cash guarantee that he will join the Local Union, in which case he must

give the union a wage assignment unless he can pay the Union at least $10.

Union has stated in its brief that these provisions of the agreement between Local 1172 and the Billings Contractors Council, Inc., and the By-Laws and Trade Rules of Local 1172 are admittedly discriminatory, but urges that they were not incorporated by reference in the International Agreement with Company. There is no suport for this contiontion. Company has clearly bound itself by the "International Agreement" to "abide by the rules and regulations established or agreed upon by the United Brotherhood of Carpenters and Joiners of America *of the locality* in which any work of our company is being done, *and employ members* of the United Brotherhood of Carpenters and Joiners." (Emphasis added). Since Local 1172 was the local representative of Union, the International Agreement incorporated by reference the agreement between Local 1172 and the Billings Contractors Council, Inc. as well as the by-laws and trade rules of Local 1172.

The record, therefore, supports the Board's finding that Union by maintaining its closed shop contract with Company during the period in question violated Section 8 (b) (1) (A) and 8 (b) (2) of the National Labor Relations Act.

Union terminated its 1956 International Agreement with Company on or before August, 1958, and entered a new agreement with Company which is presumably in conformity with the requirements of the National Labor Relations Act. However, the fact that Union had ceased its unfair labor practices in connection with the Laurel job did not preclude the issuance and enforcement of an order against such conduct. N.L.R.B. v. Local Union No. 751, United Brotherhood of Carpenters, etc., et al., 285 F.2d 633, 638 (C.A. 9); N.L.R.B. v. Local 74, Carpenters Union, 181 F.2d 126, 132-133 (C.A. 6), affirmed 341 U.S. 707; N.L.R.B. v. United Brotherhood of Carpenters, 184 F.2d 60, 63 (C.A. 10), cert. denied 341 U.S. 947. Board orders have a preven-

tive as well as remedial function, and the Board is entitled to a decree barring resumption of conduct properly found to have been illegal. N.L.R.B. v. Mexia Textile Mills, 1950, 339 U.S. 563, 567, 70 S.Ct. 826, 828; N.L.R.B. v. International Association of Machinists, 279 F.2d 761, 767 (C.A. 9), cert. den., 364 U.S. 890.

Union claims that, even if the Board was correct in its finding that Union maintained agreements containing illegal closed shop provision, the remedy proposed, particularly by way of publication in its official publications of general circulation among its members, is arbitrary, unreasonable and not appropriate to the unfair practice so found. The Court finds no merit in this objection. Company maintains its home office in Tulsa, Oklahoma, and undertakes construction projects throughout the United States. The "International Agreement" between Union and Company was obviously intended to cover Company's employees wherever they were engaged. The Union is active throughout the United States. It would be futile to require only the posting of this notice in the national headquarters of Union, or even to supplement the posting requirement with an order for publication limited to the State of Montana where the instant unfair practice occurred, for only a small portion of the workers potentially affected would be reached.

Union further urges that the order for publication should not be allowed because there was no evidence in the record that any employee had actually been discriminated against under the closed shop contract here involved. But the mere existence of a contract containing illegal union security provisions constitutes a violation of the Act and justifies the issuance of a remedial order by the Board. See N.L.R.B. v. Gottfried Baking Co., 1954, 210 F.2d 772; N.L.R.B. v. Sightseeing Guides and Lecturers Union, 310 F.2d 40 (C.A. 2).

The statutory measure of the Board's authority to remedy against an unfair labor practice is found in Section 10

(c) of the National Labor Relations Act [29 U.S.C. Sec. 160 (c)] which empowers it upon finding that an unfair labor practice has been committed to order the guilty party to "cease and desist from such unfair labor practice and to take *such affirmative action* including reinstatement, with or without back pay, *as will effectuate* the policies of the Act." (Emphasis added). It is clearly the policy of the Act that the closed shop shall be abolished. In fashioning a remedy to effectuate this policy, the Board properly took notice that this was not an isolated instance of this type of misconduct, but that the Union had been found by the Board and the courts to have violated the anticlosed shop provisions of the Act on several occasions; The Marley Co., 117 N.L.R.B. 107; Mechanical Handling Systems, 112 N.L.R.B. 396, enforced sub nom. N.L.R.B. v. Local 60, United Brotherhood of Carpenters, etc., 273 F.2d 699 (C.A. 7); Millrights Local 2232, 122 N.L.R.B. 300, enforced sub nom. N.L.R.B. v. Millwrights Local 2232, 277 F.2d 217 (C.A. 5), and that unless adequate notice was given of its order in this matter these activities might well continue or be resumed. The requirement that Union publish a notice of the order at least once in its publications generally distributed to its membership is a reasonable requirement in light of the circumstances here involved.

The Board did not abuse its discretion in formulating the order issued against Union, and enforcement of its order is granted.

(Endorsed) Opinion Filed July 15, 1963.
Frank H. Schmid, Clerk.

APPENDIX C

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF TRIAL EXAMINERS
BRANCH OFFICE
SAN FRANCISCO, CALIFORNIA

Case No. 19-CB-518
Case No. 19-CB-530

BILLINGS LOCAL NO. 1172 OF UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA,
and
MONTANA STATE COUNCIL OF THE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA
and
UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA
and
ANTHONY OCEPECK, An Individual
and
THE REFINERY ENGINEERING COMPANY, BILLINGS CONTRACTORS COUNCIL, INC.,
and
MONTANA CONTRACTORS ASSOCIATION, INC.,
Parties to the contracts

Melton Boyd, Esq, for the General Counsel

Francis S. Ward and *William A. McGowan*, by *William A. McGowan*, Esq., Indianapolis, Ind., for Brotherhood.

Charles V. Huppe, Esq., Billings Mont. for Council.

Neil S. Keefer, Esq., Billings Mont., for Local.

Before: *William E. Spencer*, Trial Examiner

Intermediate Report and Recommended Order

STATEMENT OF THE CASE

This proceeding, with all parties represented, was heard before the undersigned Trial Examiner of the National Labor Relations Board, herein the Board, in Billings, Montana, on June 24, 25, 1959, and in Great Falls, Montana, on August 13, 1959, on complaint of the General Counsel of the Board and answers respectively of the Respondents herein, namely: United Brotherhood of Carpenters and Joiners of America, herein Brotherhood; Montana State Council of the Brotherhood, herein Council; and Billings Local No. 1172 of Brotherhood, herein Local. The issues litigated were, in substance, whether the Respondents respectively violated Section 8 (b)(2) and (1)(A) of the National Labor Relations Act, 61 Stat. 136, herein the Act, by the maintenance of bargaining contracts containing hiring hall and union security provisions more restrictive than is permissible under the proviso to Section 8(a)(3) of the Act. General Counsel, Council, and Local each filed briefs.

Upon the entire record in the case and from my observation of the witnesses, I make the following:

FINDINGS OF FACT

I. THE BUSINESS OF THE EMPLOYERS

The Refinery Engineering Company, herein Refinery, is a Delaware corporation engaged in the construction of industrial type structures in various States and at times material herein, beginning in 1957, was engaged in the construction of an oil refinery plant at Laurel, Montana, near Billings, at a cost exceeding $2,500,000.

Montana Contractors, Inc., herein Montana Contractors, a Montana corporation existing as a chapter of the Associated General Contractors of America, herein AGC, represents in collective bargaining its members who are engaged principally in heavy construction work, such as the building

of industrial plants and commercial facilities in Montana. Its members, at times material herein, provided construction services valued in excess of $10,000,000.

Billings Contractors Council Inc., herein Billings Contractors, a Montana corporation, represents in collective bargaining its members who are engaged principally in building construction and specialty installations in or near Billings, Montana. Its members at times material hereto annually provided construction services valued in excess of $10,000,000.

Refinery, Montana Contractors, and Billings Contractors, are each of them employers within the meaning of Section 2(2) of the Act whose operations affect commerce within the meaning of Section (2)(6) and (7) of the Act.

II. The labor organizations involved

Brotherhood, Council and Local are, each of them, labor organizations within the meaning of the Act.

Council, "organized under the laws and by the authority" of Brotherhood, has "all the powers and exercises all the authority conferred on State Councils" by Brotherhood. It is composed of "all local unions and district councils" chartered by Brotherhood in the State of Montana. At all times material herein, Council functioned as bargaining representative for members of constituent local unions in Montana engaged in heavy construction work.

Local is chartered by Brotherhood and is a constituent member of Council. It also functions as collective bargaining agent of its members.

III. The unfair labor practices

A. *The contracts*

The validity of three bargaining contracts is essentially the issue here: (1) Brotherhood's contract with Refinery, executed about May 4, 1956, referred to at times as the In-

ternational Agreement; (2) Council's contract with Montana Contractors, executed about June 4, 1956, referred to at times as the Labor Contract; and (3) Local's contract with Billings Contractors, executed about March 14, 1956, referred to at times as the Agreement. None of these contracts has been maintained since August, 1958; all of them were maintained during all or some portion of the 6-month period preceding the filing of charges in this case. It is their maintenance during this period that is alleged to be violative of the Act. These contracts will be discussed seriatum.

1. Brotherhood's contract with Refinery

The Board has already had before it and has passed on the validity of at least two bargaining contracts made by Brotherhood which are for all practical purposes identical with the contract here in issue. In each case the Board found the contract unlawful because it required the contracting employer "to employ members of the" Brotherhood. The Board construed this language as imposing closed shop conditions. The same language appears here. I am bound by the Board's decisions and accordingly find that by maintaining its contract with Refinery during all or some portion of the six-month period preceding the filing of the charge, Brotherhood violated Section 8(b)(2) and (1)(A) of the Act. *The Marley Company*, 117 NLRB 107; *Mechanical Handling Systems, Incorporated*, 122 NLRB No. 51. Under these Board precedents, the maintenance of the contract is further violative of the said sections of the Act because (a) it required Refinery to observe terms of Local's agreement with Billings Contractors, and hiring hall requirements of Council's contract with Montana Contractors, agreements containing union security provisions violative of the Act, as will be noted in detail hereinafter; and (b) required Refinery to abide by the rules and regulations established by affiliated bodies "of the locality in which any work is being done," the said affiliated bodies here being Council and Local, and the said rules and

regulations exceeding what is permissive under Section 8 (a)(3) of the Act. See citations *supra* and *Millwrights Local 2232 (Farnsworth and Chambers, Inc.)* 122 NLRB No. 41.

The facts here, as in *Mechanical Handling System, supra*, according to Board precedent "*reveal a single comprehensive scheme for complete evasion of the statutory ban on all closed shops.*" It may be noted, parenthetically, that it is common knowledge in labor circles that this "single comprehensive scheme" has been maintained, practically without molestation until recently, throughout the existence of Taft-Hartley, and while it did not thereby become immune to attack, it hardly behooves us to feign shock or indignation at this late date.

Brotherhood's contract with Refinery was superseded by a new contract on or before August, 1958, and this new contract presumably is in conformity with requirements of the Act since it is not here under attack.

2. Council's contract with Montana Contractors, a chapter of the Associated General Contractors of America, (AGC)

This contract was negotiated by Council on behalf of local unions and district councils in the State of Montana, affiliated with the Brotherhood. The pertinent language of the hiring provisions of this contract, is:

> The employer shall notify the unions at least forty-eight (48) hours, excluding Sunday and Holidays, of his needs for workmen. The unions will furnish an adequate supply of workmen in the classifications at the rates and under the terms specified herein, when and as requested by the employer. In the event that the unions are unable to furnish such qualified workmen within the specified time, the employer may secure his men from whatever sources are available to him.

The General Counsel's contention is that this language sets up an exclusive hiring hall arrangement. It does not in any literal sense provide for *exclusive* hiring through the Union, and there is no evidence establishing that it was construed by the contracting parties as setting up an exclusive hiring arrangement. The employer is required to notify the union within whose jurisdiction he is operating of his employment needs, but in the event the union is unable to, or fails to meet these needs, the employer is free to hire from "whatever sources are available to him" and there is nothing in the contract or in the evidence to establish that employees thus recruited outside the hiring hall were required to obtain clearance through the union before being put to work. Nevertheless, the most reasonable, and in fact the only reasonable construction of the language of the contract is that *only* in the event the "unions are unable to furnish such qualified workmen within the specified time," is it permissible for the employer to "secure his men from whatever sources are available to him." I think this is enough to bring this contract under the Board's decision in *Mountain Pacific*, 119 NLRB 883, and because the contract does not provide the "safeguards" required by the Board in *Mountain Pacific*, it is, as the Board views it, violative of Section 8(b)(2) and (1)(A) of the Act.

Assuming, *arguendo*, that there was no actual enforcement of this hiring provision in the contract, nevertheless, the contract itself, because it does not contain the safeguards prescribed by the Board, is, under Board precedent, violative of the said provisions of the Act.[1] Inasmuch as Brotherhood was also signatory to the contract, it is found that Council and Brotherhood by maintaining the said contract during the six-month period prior to the filing of charges herein, or some portion thereof, violated Section 8(b)(2) and (1)(A).

[1] *Excel 215, United Brotherhood of Carpenters et al*, 125 NLRB No. 9.

Turning now to the "memorandum of Agreement" attached to this contract and a part if it, executed by both Council and Brotherhood, we find that clause 6 reads:

> It is further understood that the policy of the U.B. of C. & J. of A. is that the Carpenters Local Union within whose jurisdiction the work is being performed, and who has members qualified to do piledriving work, that such members would be permitted to work on piledriving.

The General Counsel contends that this clause provides for a closed shop but I am unable to agree. All this clause does is to state a policy of Brotherhood; it does not bind the employer to effectuate such a policy. If this is not a reasonable construction of the clause, its language is equivocal, and would require evidence of the intent of parties and/or practice under the contract, to support the General Counsel's position. The record contains no such evidence.

Council's contract with Montana Contractors was terminated on or about April 30, 1958.

3. Local's contract with Billings Contractors.

This one may be disposed of somewhat cursorily, inasmuch as it expressly provides for a closed shop in the following clause:

> The party of the first part hereby agrees to employ only such members of the party of the second part who are in good standing with the party of the second part, or who shall signify their intentions to become members and make application for membership. Party of the second part agrees to hold employers harmless against any loss which may accrue to them in any manner through the operation of this paragraph.

Attention is also directed to Article X, Sec. 1, of the Local's by-laws and trade rules:

> When a non-union man comes on the job he may be permitted to work providing he gives a cash guarantee that he will join the Local Union, but if he is unable to

> furnish at least $10.00, he shall give the Financial Secretary-Treasurer an order for the full amount on the contractor to be collected on the following two pay days, provided that the Local Union may extend the time for good and sufficient reasons.

and Article XIII, Sec. 9:

> The Steward shall examine and satisfy himself that every carpenter on the job has the current quarterly working card and Building Trades Card and also require him to write his name and address on the blank furnished by the local Union for that purpose which may be procured from the Business Agent or at the Union Hall. Every member starting on the job must seek the Job Steward at once and comply with the provisions of this section.

I agree with the General Counsel that these "internal" laws of Local, and Section 16(a) of Council's Constitution and By-Laws, if and when effectuated are "*more restrictive than is permitted by the proviso to Section 8(a)(3)*" of the Act, thereby infringing rights of employees under Section 7 of the Act who are employed by contractors bound by the Brotherhood's contract with Refinery, and that *they provide at least some of the "sense and substance" of the jurisdiction claims which Brotherhood's contract required Refinery to recognize.*

Local having made a settlement agreement with the General Counsel with respect to its contract with Billings Contractors, the findings above are in amplification of findings and conclusions previously made with respect to Brotherhood.

B. The charges

Council urges in its brief that with respect to Council there is a "fatal variance" between the charge and the complaint in this case.

The first charge initiating this proceeding was filed February 17, 1958, by a millwright, Anthony Ocepek, employed

by Refinery at Laurel, Montana. It alleged that Local caused him to be removed from his job "pursuant to the provisions of an illegal union security contract which contained exclusive hiring and dispatching provisions or arrangements all in violation of the Act." The charge does not specify what "illegal security contract" it refers to, and makes no allegation with respect to either Council or Brotherhood. Were we considering a complaint based on this first charge, obviously there would be a fatal variance with respect to Council, and Brotherhood as well, inasmuch as they could not properly be joined as respondents on the basis of such a charge.[1a] The consolidated complaint, however, did not issue on the original but on an amended charge, and on an original charge against Brotherhood.

The amended charge, filed April 14, 1958, after repeating that the Local caused Ocepek to be removed from his job with Refinery, alleges further:

> That the above described act against Anthony Ocepek was taken by said Local No. 1172 pursuant to the provisions of an illegal hiring, dispatching, and clearance clause in a collective bargaining agreement between Montana Contractors Association Inc. and Montana State Council of Carpenters, acting for and on behalf of said Local Union No. 1172 and other affiliated district councils and local unions, which provisions were incorporated by reference in a national collective bargaining agreement between said company and the United Brotherhood of Carpenters and Joiners of America, AFL-CIO, all in violation of Section 8(b)(1)(A) and 8(b)(2) of said Act.
>
> The said Local Union No. 1172 is and has been a party to an illegal collective bargaining agreement

[1a] The General Counsel inferentially concedes that the complaint may not properly run against a party not named in the charge upon which the complaint is based. Thus, he admits that no remedial order may run against any of the local unions represented by Council except Local 1172 because only Local 1172 is named in the charge.

> with the Billings Contractors Council which illegally conditions employment by its members companies on membership in said Local Union No. 1172 in violation of Section 8(b)(1)(A) and (2) of said Act.

Also on April 14, Ocepek filed on original charge alleging that Brotherhood:

> is and has been a party to a national collective bargaining agreement with the Refinery Engineering Company, which illegally requires membership in affiliated local unions of said International Union in local areas where said company is engaged in construction projects as a condition of employment with said company and that said national agreement further requires said company to adhere to similar illegal hiring referral and clearance procedures contained or provided for by collective bargaining agreements and or other illegal hiring arrangements promulgated or established by them in their respective local areas, all in violation of Section 8(b)(1)(A) and Section 8(b)(2) of the Act.

From the foregoing it is seen that the amended charge specifically and unequivocally names Local as violating the Act by being a party to an unlawful contract with Billings Contractors. The original charge filed against Brotherhood on the same date as the amended charge, also specifically and unequivocally charges Brotherhood with violations of the Act because of its contract with Refinery.

No such specific and unequivocal allegation appears in the amended charge with respect to Council. Council is not actually named in the amended charge as having committed any unlawful acts. The allegation is that *Local* in causing Ocepek's discharge acted pursuant to unlawful hiring and dispatching provisions in Council's contract and that the said provisions were incorporated in Brotherhood's contract with Refinery "all" in violation of the Act. Paragraph two of the charge in which this allegation is made is no model of clarity, but it may be argued with some persuasiveness that if it was the intent of the charging

party to name Council as having engaged in unfair labor practices by maintaining an unlawful contract, this would have been spelled out in the same specific and unequivocal language which charges Local and Brotherhood with violations because of their respective contractual relationships with employers. The concluding phrase of paragraph two obviously was not considered sufficient to hold the Brotherhood and an original charge was filed against it. It hardly suffices to say that Ocepek, being a millwright, could not be expected or required to spell out his charge with the specificity to satisfy a Philadelphia lawyer, because it is my assumption, and one that I do not expect to have disputed, that Ocepek did not himself prepare the text of any of the charges bearing his signature.

To say the least, then, the allegation with respect to Council is somewhat ambiguous. From this flows Council's argument in its brief that Council and its contract with Montana Contractors having been named in the charge only in connection with the allegedly unlawful action taken by *Local* with respect to Ocepek, and the case against Local having been settled and no evidence having been received thereon, the charge is extinguished with respect to Council and therefore cannot lawfully ground a complaint naming Council as a Respondent in this proceeding.

It is true that Ocepek's alleged discharge was not litigated in this proceeding. Ocepek did not testify; there is no evidence with respect to him and therefore no basis for a finding that he was discharged or denied employment pursuant to the terms of Council's contract, as alleged in the amended charge, or any other contract for that matter. A settlement agreement executed by Local with respect to Ocepek and Local's contract with Billings Contractors and approved by the General Counsel, took Ocepek out of the case. In short, there is no evidence in this case that Local caused Ocepek to be removed from his job "pursuant to the provisions of an illegal agreement between Montana Con-

tractors Association, Inc. and Montana State Council of Carpenters, etc." The real question therefore is whether the General Counsel having "got his foot in the door" by virtue of Ocepek's amended charge, can proceed against Council regardless of the disposition of Ocepek's case and despite the fact that Council is not specifically named in the charge as having committed an unfair labor practice.

Whatever doubts I have in the matter, and I have some, are resolved adversely to Council's position largely because of the great latitude granted the General Counsel by the Board and the Courts in enlarging the scope of the complaint beyond the allegations appearing in the charge so long as there is a reasonable relationship between such enlargements and additions and the substance of the charge. There is no need to take up space here with quotations from decisions holding that a charge merely initiates a proceeding and that if upon investigation the General Counsel unearths additional matters reasonably related to the charge these may also be incorporated in the complaint. I have little doubt that inasmuch as the amended charge makes mention of Council's contract as providing the ground for unlawful action taken by Local, the Board will find that the General Counsel, irrespective of the disposition of the case with respect to Ocepek and Local, can properly train his guns on Council's contract and hold Council accountable for it.

The second prong of Council's two-pronged argument on the charges is in substance, as I understand it, that matters appearing in the amended charge and the original charge against Brotherhood have so little relation to Ocepek's initial charge as to be invalid. There is no restriction on the filing of amended charges and while it is assumed that there is a relationship between an amended charge and the charge it amends, obviously the scope of the former may greatly exceed that of the latter. I think what Council really is arguing is that matters appearing in the amended charge

and the original charge against Brotherhood are remote from what may reasonably be regarded as Ocepek's interest in filing a charge in the first place, and in reality were authorized not by Ocepek but by the General Counsel.

It is not questioned that Ocepek signed each of the three charges in question and no one has contended that he was in any way "pressured" into affixing his signature thereto. We may speculate on whether Ocepek, a millwright who had lost his job and doubtless wanted to get it back with some compensation for time lost and some assurance that he would not again be ousted under the same or similar circumstances, had any idea in filing his initial charge of starting a one-man crusade against all the contractual involvements of the Brotherhood and its affiliated unions in the State of Montana and as far away as Perth Amboy, New Jersey. In fact we may do a little more than speculate in view of the settlement with the Local which apparently gave Ocepek all that he wanted, and he straightway withdrew from the case. Such speculation, however, leads only to a dead end.

I think it is well known to the Board, which exercises joint control with the General Counsel over its regional offices, that when a person articulates a desire to file a charge alleging an unfair labor practice, the facilities of the Board's offices and personnel are at his disposal in the preparation and appropriate wording of the charge which he wants to file. I think it is also well known that if in their investigation of the charge, the Board's agents conclude that the charge might well be rendered more specific or enlarged upon by the inclusion of additional related matters, this may be and usually is called to the attention of the charging party and he is afforded an opportunity to amend his original charge, again with the assistance and advice of Board personnel. Doubtless there are limits to such "services" rendered by Board personnel to persons filing or wishing to file charges, and those limits certainly

lie this side of coercion, deception, intimidation, and the like. Nobody claims that anything of that sort occurred here and I am sure that it did not. But just precisely where those limits lie I do not know; possibly this side of persuasion, even though such persuasion be entirely free of any taint of intimidation.

The only question of substance raised here is whether Ocepek actually "initiated" the filing of the amended charge and the charge against Brotherhood, both filed some two months after the initial charge, or whether in actuality, although Ocepek's signature is affixed thereto, the General Counsel initiated these additional matters in order to launch a full-scaled attack on Brotherhood's contractual commitments in Montana and elsewhere. Assuming as I did that these enlargements on and extensions to Ocepek's initial charge against Local, resulted from the investigation of the initial charge, and were included in the amended charge and the charge against Brotherhood at the General Counsel's suggestion, and assuming further that such action was in accord with practice of long standing and well known to the Board, I saw no reason to burden this record with evidence which could do no more than reveal such facts.[2]

[2] The extent to which the General Counsel regards the filing of a charge of discrimination as a springboard from which to launch an attack on contracts deemed by him to be violative of the Act, appears in a document dated January 9, 1956, addressed to Regional Directors and officers in Charge, but distributed generally among Board personnel, including Trial Examiners:

> A resume of advice given in the Atl [illegible] cases is submitted for your information and guidance. You will note that underlying the advice given is the policy to issue complaint, absent settlement, in cases where investigation of a proper charge discloses contract provisions on their face illegal under the Act. Such attack will be made despite the absence of specific reference to the contract provision in the charge, and even though (1) you have been unable to obtain an amendment of the charge and (2) the individual discrimination charges of the case lack merit.

C. *The settlement agreements*

1. With respect to Local

Paragraph XV of the complaint alleges:

> Local 1172 and Ocepek executed a settlement agreement dated August 26, 1958, and an amended settlement agreement dated April 28, 1959, which were approved by the undersigned Regional Director on September 15, 1958 and April 29, 1959, respectively, which operated to settle and remedy any unfair labor practice of Local 1172 in discriminating against Ocepek individually, and in having maintained its collective bargaining agreement with Billings Contractors dated March 14, 1958 until that "Agreement" was terminated on May 21, 1958.

The only issue here is whether these settlement agreements were coextensive with the charges filed against Local, or whether, as contended by the General Counsel, they did not operate to extinguish Local's liability with respect to the contract made by Council on behalf of various local unions including Local 1172. Referring back to the amended charge, it is again noted that it alleged (1) that Local caused discriminatory action to be taken with respect to Ocepek under Council's contract, and was a party to an unlawful agreement with Billings Contractors. As conceded, the settlement agreement extinguished the charge with respect to discrimination practiced against Ocepek individually, and the charge of unlawful agreement with Billings Contractors. Did it also—as urged by Local—extinguish the charge against Local with respect to Council's contract under which it was alleged the discrimination against Ocepek occurred?

Again it is noted that the charge does not specifically allege that Local's involvement in that contract was independently violative of the Act though it did specifically allege an independent violation because Local was a party to a contract with Billings Contractors. It may be argued

therefore that the settlement agreement which admittedly extinguished the charge of discrimination against Ocepek extinguished everything that was specifically charged against Local with respect to Council's contract. However, it will again be assumed—as it has been heretofore with respect to Council—that the charge was sufficient to ground a complaint running against Local as a party to Council's contract independently of any action taken against Ocepek individually, and we look to the language of the settlement agreements to determine if they are in fact coextensive with the charge thus given its broadest construction.

The amended settlement agreement executed April 2, 1959, and approved by the Regional Director April 30, 1959, provided for a lump sum payment by Local to Ocepek and the posting of notices by Local containing the usual remedial clauses with respect to Ocepek, and also the following language:

> WE WILL NOT perform, maintain, or give effect to the provisions of *any* agreement or practice with Billings Contractor Council, Inc., its member companies, *or any other employer* whose operations affect commerce, which unlawfully conditions the hire of applicants for employment, or the retention of employees in employment upon clearance or approval by this labor organization, or upon membership therein except as authorized by Section 8(a)(3) of the Act. (Emphasis added).

The agreement also contained this clause:

> The Regional Director's approval of this Amendment Settlement Agreement does not signify National Labor Relations Board approval of the terms and conditions of any agreement or arrangement which the parties thereto may execute, enforce or maintain *in futuro*.

Finally, as concerns us here, the agreement contains this language:

> Contingent upon compliance with the terms and provisions hereof, no further action shall be taken in the above case *on the issues here settled.* (Emphasis added).

No contention is made that Local has in any way failed in "compliance with the terms and provisions" of this settlement agreement, has engaged in any activity subsequent to the approval of the Agreement which would justify "opening it up" and setting it aside, or that we are here asked to take action with respect to agreements or arrangements enforced or maintained "*in futuro*" within the meaning of this term as used in the settlement agreement. It is possible that the addition in typewriting to a standard printed form of the words "on the issues here settled," as quoted and underlined above, was meant to reserve to litigation the issue of Local's participation in Council's contract, but there is no evidence on the point.

It appears to me that the language of the notice which Local was required to post under the settlement agreement, while it makes no specific mention of Council's contract, is unquestionably broad enough to cover Local's involvement in that as well as any other bargaining contract to which it was a party, and I can only conclude that this agreement on its face is coextensive with the charges filed against Local. Accordingly, I shall recommend dismissal of the complaint with respect to Local.

2. With respect to Employers

Settlement agreements pursuant to charges by Ocepek were executed respectively by the Refinery Engineering Company, Billings Contractors Council, Inc., and Montana Contractors Association, Inc., the three employers who were parties to contracts here alleged to have been unlaw-

fully maintained by the Respondents. These agreements were approved by the Regional Director and presumably were deemed coextensive with the charges since otherwise it is reasonably assumed that these employers would have been joined as respondents under a consolidated complaint. The settlement agreements required the posting of notices customary where employers are charged with maintaining contracts containing unlawful union security clauses. It is only indirectly and with respect to appropriate remedial action that we are interested in these settlement agreements, and there is no need to set them forth in detail, it being sufficient to note that none of them required the application of the Board's *Brown-Olds* reimbursement remedy, or any part of it. *Brown-Olds Plumbing and Heating Corp.*, 115 NLRB 594.

3. With respect to Brotherhood and Council

There was extensive correspondence between a Field Examiner of the Board and the Respondents herein with respect to settlement agreements which when and if approved by the Regional Director would serve to extinguish the charges then pending against the Respondents. The agreement and amended agreement ultimately made by Local and Ocepek and approved by the Regional Director has already been referred to in some detail. It is needless to explore the settlement agreements proposed by the Board's agent with respect to charges against Council and Brotherhood, further than to note that repeated warnings were given that if Council and Brotherhood did not execute the proposed agreements they would run the risk of having the *Brown-Olds* reimbursement remedy imposed on them as a result of litigation. In short, none of the proposed agreements, with the exception of the one executed by Local, called for a reimbursement remedy, and their proffer by an agent of the Board, stripped to its essentials, was: execute these settlement agreements without the requirements of a *Brown-Olds* reimbursement, or take your chances

of having this remedy imposed on you by the Board. I think it is fair to state that the proposed agreements were no more drastic than were those executed by the several Employers involved. Neither Brotherhood nor Council executed the proposed agreements, however, and the agreement executed by Local did not require the application of a *Brown-Olds* remedy.

D. *Correspondence re application of Brown-Olds reimbursement remedy*

By letter dated February 7, 1958, General Counsel Jerome D. Fenton addressed Richard J. Gray, President, Building Construction Trades Dept., AFL-CIO, as follows:

> As you know, the Board, commencing with the Brown-Olds case, 115 NLRB 594, has held that where illegal hiring arrangements exist, either pursuant to a contract or practice, the appropriate remedy, in addition to the usual remedial provisions, requires the reimbursement of all monies, including initiation fees, dues, permit fees, assessments, "dobies," and the like, collected pursuant to such arrangements. The purpose of the Board in applying the so-called *Brown-Olds* reimbursement remedy is to effectuate the policies of the Act by, among other things, prevailing upon employers and unions to correct their illegal hiring arrangements.
>
> It would be preferable, of course, if the parties took it upon themselves to correct their illegal hiring arrangements, thereby achieving the same basic purpose sought by the Board but without the necessity of Board action. Such over-all elimination of illegal hiring arrangements, by voluntary action, would not only help effectuate the purposes of the Act, but would clearly be an important step in the general public interest and in the furtherance of the fundamental rights of employees.

With this thought in mind, I would like to suggest that during a period of three months, commencing March 1, 1958, employers and unions, who are party to illegal hiring arrangements, vigorously undertake to correct such arrangements by bringing them into compliance with the provisions of the Labor Management Relations Act of 1947. If this is done, it may warrant the disposition, without full application of the *Brown-Olds* reimbursement remedy, of charges based upon illegal hiring arrangements which have been voluntarily conformed to the provisions of the Act during the period prior to June 1, 1958. It will also warrant my recommending to the Board during such period a similar disposition of cases currently pending or brought before the Board with respect to such illegal hiring arrangements. It is understood, however, that apart from the non-application of *Brown-Olds* reimbursement remedy, all charges and cases relating to or arising out of illegal hiring arrangements must be processed in normal fashion although such arrangements may have been corrected during the period prior to June 1, 1958.

The Office of the General Counsel will be pleased to cooperate with employers and unions in this matter.

By letter dated April 15, 1958, Gray referred to the Board's *Mountain Pacific* decision (119 NLRB No. 126-A), and requested that the General Counsel extend to September 1, 1958, the moratorium on application of *Brown-Olds* previously announced. The General Counsel by letter dated April 21, 1958, replied:

This is in reply to your letter of April 15, 1958, dealing with the matter of illegal union-security and hiring clauses and practices in the Building and Construction Industry. In your letter you request that we extend until September 1, 1958, the period during which this Agency will withhold application of the *Brown-Olds*

reimbursement remedy so that employers and unions may complete arrangements to bring hiring practices and clauses into conformity with the provisions of the Labor Management Relations Act, 1947.

For the reasons stated in your letter of April 15, 1958, and in view of the action thus far taken by the interested parties, we are agreeable to an extension to September 1, 1958, in order that you may complete the revision of caluses and practices necessary to conform with the requirements of the Act.

Finally, by letter to Gray dated August 19, 1958, the General Counsel stated:

On February 7, 1958, this Agency announced that during the period from March 1 to June 1, 1958, it would withhold full application of the *Brown-Olds* reimbursement remedy where employers and unions voluntarily bring their union-security and hiring arrangements into conformity with the provisions of the Labor Management Relations Act of 1947, as amended. On April 23, 1958, the period during which this announced policy would apply, was extended to September 1, 1958. This extension was based, in part, on the vigorous undertaking by a large number of unions and employers to comply with the above policy and on the desire to provide the parties with a sufficient opportunity to review their agreements in light of the Board's decision in *Mountain Pacific Chapter of The Associated General Contractors, Inc.*, (119 NLRB No. 126-A, released April 1, 1958, which established certain legal requirements for exclusive hiring arrangements,) and to complete their negotiations in an orderly and informed manner.

In supplementation of the foregoing and, in accord with our announced desire to cooperate with and to assist the parties in whatever way possible in this mat-

ter, the Office of the General Counsel recently issued a statement with regard to union hiring halls and referral systems in which comment was made on various questions which had been raised by unions, employers and other interested parties as to the scope and implications of the Board's *Mountain Pacific* decision.

Since the issuance of that statement we have received numerous communications which demonstrate that many employers and unions are still in the process of renegotiating their agreements in an attempt voluntarily to conform such agreements with the Act but, that due to unavoidable delays inherent in such negotiations, and the complex problems involved, appropriate new agreements, in many instances, will not be executed by September 1.

Under all the circumstances, we have determined that no general extension of the policy of withholding the full application of the *Brown-Olds* remedy beyond September 1 is warranted. However, where the parties have initiated steps and have made genuine efforts to correct their union security and hiring arrangements prior to the September 1 deadline, the full application of the remedy may be withheld provided that conformity with the ACT is achieved by November 1, 1958.

You may be assured of our continued cooperation with your efforts to conform your union security and hiring arrangements to the requirements of the Act.

Admittedly, all of the agreements here attacked as having been unlawfully maintained within the six-month period preceding the filing of a charge, were brought into compliance with the Act well before the deadline of September 1, 1958, set in the General Counsel's correspondence with Gray. I believe it is common knowledge that the Respondents are affiliated with Gray's organization.

IV. The Effect of the Unfair Labor Practices Upon Commerce

The activities of the Respondents set forth in Section III, above, occurring in connection with the operations of the Employers described in Section I, above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States, and such of them as have been found to constitute unfair labor practices tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. The Remedy

It having been found that Brotherhood and Council maintained within the six-month period preceding the filing of charges contracts containing unlawful hiring hall and union security provisions, it will be recommended that they cease and desist from such practices and post and publish certain notices designed to effectuate the policies of the Act. Such "remedial" action is required by long established and court approved Board policy though admittedly the contract provisions complained of have been eliminated.

Though the litigation proceeded on the theory that a *Brown-Olds* remedy would be demanded by the General Counsel, the General Counsel does not now seek the application of a disbursement remedy. I am aware that the General Counsel has no authority to bind the Board with respect to remedy at the post-litigation level,[3] but that does not mean that the General Counsel's recommendations in the matter are not entitled to consideration and, where circumstances warrant it, weight. Where charges have been filed but no complaint issued, the General Counsel in arriving at settlement agreements with parties charged with the commission of unfair labor practices, apparently is free of Board restraint in his determination of what measures are

[3] *Portsmouth Contractors Association*, 124 NLRB No. 162.

required to effectuate the policies of the Act. The matter of remedy is not therefore the exclusive province of the Board at all levels, unless we regard informal settlement agreements the province of the Board rather than that of the General Counsel. I would not understand how in the effectuation of a *public policy*—a matter in which the General Counsel presumably is as much concerned as the Board—we can reasonably ignore the position of the General Counsel where he has incorporated his views on an appropriate remedy in settlement agreements with parties charged with the commission of unfair labor practices based on precisely the same factual situation present here. The General Counsel and the Board are two organs of the same body, and while in terms of litigation one fills the role of prosecutor and the other that of judge, there are wide areas in which the demarcation in their respective roles is not so distinct.

The several settlement agreements relating to the same contracts and practices for whose maintenance Brotherhood and Council are here found in violation of the Act, required no application of a *Brown-Olds* remedy. With respect to these agreements the General Counsel's determination that they were all that was required to effectuate the policies of the Act, must prevail. The settlement agreements proffered Brotherhood and Council, and urged on them by the Board's Regional Office, required no application of a *Brown-Olds* remedy. Brotherhood and Council refused to execute the proffered agreements, preferring that the issues with respect to them be litigated, but we are not involved here in an application of criminal law where a plea of guilty may bring a lighter sentence, nor a civil suit between private parties where the rule of mitigation of damages applies. Nor are we dealing here with a case where there were no charges filed except as to the Respondents herein and where, therefore, the processes of this Agency were not set in motion with respect to other parties

to the unlawful maintenance of contracts. The several employer-parties to the contracts, and Local, also a party to the maintenance of unlawful union security provisions, having escaped the application of a *Brown-Olds* remedy by virtue of informal settlement agreements, and the Board now being bound to recognize and give effect to those agreements, the application of a *Brown-Olds* remedy against Brotherhood and Council certainly would have the appearances of a penalty imposed on them for resorting to litigation. This may well be a layman's eyeview of the situation rather than a lawyer's, and bearing in mind that public policy considerations are paramount in the framing of an appropriate remedy, I do not intend to explore here the fine legal distinctions defining "penalty," "punitive," "equitable estoppel," etc., in cases where public policy is not the paramount consideration. In any event, I find an even more compelling barrier to the imposition of a *Brown-Olds* remedy in the exchange of correspondence between the General Counsel and Gray.

In this correspondence Gray, in his representative capacity for the building trades unions, was explicitly promised a moratorium on the application of a *Brown-Olds* remedy provided the unions affiliated with his organization brought their contracts into compliance with the Act within a stipulated period. There is nothing in these letters which could be construed as relating only to contracts of the *Mountain Pacific* variety; they referred to whatever hiring hall or union security arrangements were then incorporated in contracts between the building trades unions and employers, without limitation. The Board was not signatory jointly with the General Counsel in this exchange of correspondence, but it is noted that while in the letter dated February 7 the General Counsel spoke in terms of "recommending to the Board" the aforementioned moratorium, in subsequent letters dated April 15 and April 21 respectively, he purported to speak for the *Agency*. The Board

is just as much a part of the *Agency* as the General Counsel. There can be little doubt that the recipients of these letters would reasonably conclude, in absence of some public or private disavowal by the Board, that they had been promised immunity to the application of *Brown-Olds* by the *Agency*, if they complied with the requirements contained in the letters. The content of these letters was widely publicized.[4]

I do not, of course, purport to know just precisely what was the Board's position in the matter at the time the correspondence between Gray and the General Counsel occurred, but I note that in its brief filed with the United States Court of Appeals for the District of Columbia in *Local 357, International Brotherhood of Teamsters, et al*, 121 NLRB No. 205, the Board states at page 51, footnote 59: " . . . petitioner makes much of the fact that the Board order in *Mountain Pacific, supra*, did not include any disbursement remedy. The simple answer is that the Board was going along with the 'moratorium' policy at the time and did not utilize the remedy in a *Mountain Pacific* type of case until the instant case, at the close of the 'morato-

[4] The Respondents were repeatedly warned by a Field Examiner of the Board's Regional Office, that if they did not execute the proposed settlement agreements they would risk the application of a *Brown-Olds* remedy by the Board. Unless he be regarded as an agent of the Board, the Field Examiner's warnings could not reasonably be construed as stating the Board's official position in the matter of the moratorium. At most they would indicate that the General Counsel would press for an application of *Brown-Olds* contrary to his commitments to Gray. I should think that having brought the contracts in question into compliance with the Act well within the period stipulated by the General Counsel, the Respondents were justified in in insisting on a litigation of the issues inasmuch as the warnings ran counter to commitments made directly to them by the General Counsel who purported to speak for the Agency. Of course, the qualifying word "full" as used in the General Counsel's letters may have been meant for an escape hatch?

rium' period."[5] Needless to repeat, all the contract provisions here under attack were eliminated or brought into compliance with the Act before the close of the moratorium period.

All of these matters, in my opinion, have such a direct and intimate bearing on the shaping of a remedy consistent with sound and fair public policy, that I have deemed it my duty as a Trial Examiner to set them forth in some detail, particularly inasmuch as they explain why I am following the Genera' Counsel's recommendations with respect to remedy. I am aware that the Board has applied a *Brown-Olds* remedy in cases whose factual situations are substantially identical with the case at bar, but in reading such of these decisions as have come to my notice I am unable to tell whether factors here deemed crucial have been urged or considered. I have, therefore, felt constrained to apply my own judgment in the matter.[6]

Upon the basis of the above findings of fact, and upon the entire record in the case, I make the following:

CONCLUSIONS OF LAW

1. The Refinery Engineering Company; Billings Contractors Council, Inc.; and Montana Contractors Association, Inc., are, each of them, employers within the meaning

[5] The footnote continues: "In any event, surely abstention from imposition of an appropriate remedy in one case is no basis for an argument that the remedy may not be applied in another case where it is appropriate, and where a fair warning of its imposition has been announced in advance."

[6] Inasmuch as I recommend no disbursement remedy, I have made no findings on the matter of precisely when each of the unlawful contracts was superseded or terminated further than to find that the illegal hiring hall and union security provisions were maintained during at least some portion of the six month period preceding the filing of the charge, and all were superseded or terminated prior to September 1, 1958.

of Section 2(2) of the Act, engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Brotherhood, Council and Local are, respectively, organizations within the meaning of Section 2(5) of the Act.

3. By maintaining agreements with The Refinery Engineering Company and Montana Contractors Association, Inc., containing hiring and other union security clauses more restrictive than is permissive under the proviso to Section 8(a)(3) of the Act, Brotherhood and Council, respectively, have engaged in and are engaging in unfair labor practices within the meaning of Section 8(b)(2) of the Act.

4. By the maintenance of the said agreements, Brotherhood and Council have interfered with, restrained and coerced employees in the exercise of rights guaranteed them in Section 7 of the Act and have thereby engaged in unfair labor practices within the meaning of Section 8(b)(1)(A) of the Act.

5. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

RECOMMENDATIONS

Upon the basis of the foregoing findings of fact and conclusions of law, and upon the entire record in the case, it is recommended that Respondents Brotherhood and Council, jointly and severally,

A. Cease and desist from:

(1) Performing, maintaining or otherwise giving effect to provisions of any agreement or understanding with The Refinery Engineering Company, or Montana Contractors Association, Inc., and its employer members, or with any other employer whose operations affect commerce within the meaning of the Act which, in an unlawful manner, con-

ditions the hire of employees or the retention of their employment upon clearance or approval by any of the Respondent Unions or by any other labor organization.

(2) Performing, maintaining or otherwise giving effect to provisions of any agreement or understanding with The Refinery Engineering Company or Montana Contractors Association, Inc., and its employer members, or with any other employer whose operations affect commerce within the meaning of the Act which conditions the hire of employees upon membership in any of the Respondent Unions or subservience to its policies, or conditions the retention of employees in employment upon membership in any of the Respondent unions or subservience to its policies except to the extent that membership therein as the condition of continuing in employment may be required on or after 30 days by an agreement permitted by the proviso to Section 8(a)(3) of the Act, as modified by the Labor Management Reporting and Disclosure Act of 1959.

(3) In any like or related manner, restraining or coercing employees in the exercise of their rights guaranteed by Section 7 of the Act, including the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection; and also the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8(a)(3) of the Act, as modified by the Labor Management Reporting and Disclosure Act of 1959.[7]

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[7] I have adopted the cease and desist order proposed by the General Counsel.

B. Take the following affirmative action to effectuate the policies of the Act:

(1) Post at their respective offices in all locations where notices to members are customarily posted, and publish in their official publications of general circulation among members, copies of the notice hereto attached marked Appendix. Copies of said notice, to be furnished by the Regional Director for the Nineteenth Region, Seattle, Washington, shall, after being duly signed by representatives, respectively, of Brotherhood and Council, be posted by them immediately upon receipt thereof and conspicuously maintained by them for a period of sixty (60) consecutive days thereafter in all places where notices to members are customarily displayed in their respective offices. Reasonable steps shall be taken by the Respondents to insure that said notices are not altered, defaced, or covered by other material. Also the said notices after having been duly signed as directed above, shall be published by the Respondents respectively in the next succeeding issue of whatever publications are normally issued by them and distributed generally among their respective memberships.

(2) Additional copies of the said notice herein marked Appendix, to be furnished by the Regional Director of the Nineteenth Region, shall be signed by a representative of each Respondent and forthwith returned to the said Regional Director. These notices shall be posted, Refinery and Montana Contractors willing, in places where notices to employees of Refinery and members of Montana Contractors covered by Respondents' contracts found herein to have incorporated unlawful union security provisions, are customarily posted.

(3) Notify the Regional Director for the Nineteenth Region in writing within twenty (20) days from the date of the receipt of this Intermediate Report and Recommended Order what steps have been taken in compliance. It is further recommended that unless the Respondents, within

twenty (20) days from the date of the receipt of this Intermediate Report and Recommended Order, notify said Regional Director in writing that they will comply with the foregoing recommendations, the National Labor Relations Board issue an order requiring the Respondents to take the aforesaid action.

It is recommended that the complaint be dismissed with respect to Local.

Dated this 9th of December 1959.

WILLIAM E. SPENCER
William E. Spencer
Trial Examiner

APPENDIX

TO ALL MEMBERS OF UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AND OF LOCAL UNIONS AFFILIATED WITH MONTANA STATE COUNCIL OF UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA:

PURSUANT TO

THE RECOMMENDATIONS OF A TRIAL EXAMINER

of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, we hereby notify our members that:

WE WILL NOT, jointly or severally, enter into, maintain or enforce any contract, agreement, understanding, or practice, with THE REFINERY ENGINEERING COMPANY, MONTANA CONTRACTORS ASSOCIATION, INC., or any other employer, which requires employees or prospective employees to obtain job referrals or permits, or which unlawfully conditions the hire of applicants for employment or retention of employees in employment

by such employers or any other employer, upon clearance or approval by us, jointly or severally, except as authorized by Section 8(a)(3) of the Act, as modified by the Labor Management Reporting and Disclosure Act of 1959.

WE WILL NOT, jointly or severally, in any like or related manner restrain or coerce employees or prospective employees of THE REFINERY ENGINEERING COMPANY, MONTANA CONTRACTORS ASSOCIATION, INC., or any other employer, in the exercise of the rights guaranteed in Section 7 of the Act, except to the extent that such rights may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized by Section 8(a)(3) of the Act, as modified by the Labor Management Reporting and Disclosure Act of 1959.

Signed copies of this notice have been mailed to the National Labor Relations Board's Regional Director for the Nineteenth Region for posting by The Refinery Engineering Company and employer members of Montana Contractors Association, Inc., maintaining contractual relations with us, the said employers willing, in all locations where notices to their employees are customarily posted.

UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA

Dated ..... By .....
(Representative) (Title)

MONTANA STATE COUNCIL OF THE BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA

Dated ..... By .....
(Representative) (Title)

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

APPENDIX D

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

Dated Feb. 16, 1961

Case No. 19-CB-518

BILLINGS LOCAL NO. 1172 OF UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, and MONTANA STATE COUNCIL OF THE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA

and

UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA

and

Case No. 19-CB-530

ANTHONY OCEPEK, An Individual

and

THE REFINERY ENGINEERING COMPANY, BILLINGS CONTRACTORS COUNCIL, INC., and MONTANA CONTRACTORS ASSOCIATION, INC.,

Parties to the contracts

Decision and Order

On December 9, 1959, Trial Examiner William E. Spencer issued his Intermediate Report in the above-entitled proceedings finding that the Respondents had engaged in and were engaging in certain unfair labor practices and recommending that they cease and desist therefrom and take certain affirmative action, as set forth in the copy of the Intermediate Report attached hereto. He also recommended dismissal of the complaint as to Respondent Local because

of his interpretation of a settlement agreement entered into by it. Thereafter the Respondent Brotherhood filed exceptions, Respondent State Council and the General Counsel filed exceptions and briefs in support, and Respondent Local filed a brief in answer to that of the General Counsel.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its powers in connection with this case to a three-member panel.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Intermediate Report, the exceptions and briefs, and the entire record in the case, and hereby adopts the findings, conclusions and recommendations of the Trial Examiner with the following additions and modifications.

1. We agree with the Trial Examiner that Respondent Brotherhood by maintaining its closed shop contract with the Company during the period in question violated Section 8(b)(2) and (1)(A) of the Act.[1]

We also agree that Respondent Council by maintaining its hiring hall agreement with the Montana Contractors Association during the period in question violated Section 8(b)(2) and (1)(A) of the Act. In this connection we find no merit in Council's exception that this proceeding should be dismissed because of lack of evidence that the said statewide contract it negotiated was part of the original controversy instituted by the Charging Party against Respondent Local. The original charge was amended on April 14, 1958, by Charging Party to include the Council and specify the objectionable contract. Thereafter the Charging Party's individual claim was settled, but as the

[1] See *The Marley Company*, 117 NLRB 107; *Mechnical Handling Systems, Inc.*, 122 NLRB 396.

Board has said, once a charge is filed, the General Counsel proceeds as the representative of an agency entrusted with the power and duty of enforcing the Act in the public interest, not merely in vindication of private rights.[2]

We adopt pro forma—as there was no exception—the Trial Examiner's finding that clause 6 of the memorandum concerning pile drivers attached to the said State-wide contract with the Council does not provide for a closed shop.

2. Contrary to the Trial Examiner, we find that Respondent Local 1172 has engaged in certain unfair labor practices within the meaning of Section 8(b)(2) and (1)(A) of the Act covered by the complaint herein. As alleged in the complaint and set forth in the Intermediate Report, the Local and Charging Party Ocepek executed a settlement agreement in Case No. 19-CB-518[3] covering the Local's discrimination against Ocepek individually and the maintenance by Local of an illegal closed shop agreement with Billings Contractors. Based upon the broad language of the notices posted pursuant to the settlement agreement which stated that the Local would not give effect to *any* agreement or practice with Billings Contractors Council *or any other employer*, the Trial Examiner found that the said settlement was coextensive with the charges filed against the Local including its participation in the State-wide hiring hall contract entered into by the Council in June 1956 for all of the constituent locals including Respondent Local. This conclusion, however, attaches no significance to the words "on the issues hereinsettled" which

[2] See *The Ingalls Steel Construction Company*, 126 NLRB No. 60, fn. 1.

[3] This was an agreement covering the Billings contract and an amended agreement of later date adding the discrimination against Ocepak. The Complaint herein issued April 30, 1959, the day on which the amended agreement was approved by the Regional Director.

were typed on the printed form used in the amended settlement agreement. The General Counsel in its exceptions contends that the purpose of adding these words was to save the issue of the Local's maintenance of the Council's State-wide contract, apart from discrimination under it against Ocepek as charged, and adverts to the fact that—as the record shows—both the Local and the Council had refused to settle this issue by executing a *joint* settlement agreement submitted to them in August 1958 by a field examiner of the Board. We find merit in the General Counsel's position. Despite the broad language of the notice, posted by the Local as a part of the settlement, we conclude that maintenance of the State-wide contract by the Local was not covered by the settlement agreement which showed on its face that it did not purport to be a complete settlement of all issues.

In its brief the Local refers to the complaint as an attempt to penalize it by virtue of its being a constituent of the International and the Council, and because of the existence of objectionable phraseology "of certain documents" without a showing that "the contested language was applied to anyone . . . " Concerning the latter, the Board has held that contracts, agreements, understandings and practices which unlawfully require the payment of dues and fees as a condition of obtaining or retaining employment are in themselves coercive of employees.[4] Concerning the former point the State-wide contract was specifically negotiated by the Council "acting for" the "signatory" locals. As it is implicit in this record that Local 1172—a party to the proceeding—did sign that contract,

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[4] See *Nassau and Suffolk Contractors' Association, Inc.*, 123 NLRB 1393; *Motion Pictures Operators Union of Essex County, Local 244 (Stanley Warner Corporation)*, 126 NLRB No. 46. We note that the record does contain testimony by an employer member of the Montana Contractors Association that it hired its carpenter employees "through the union hall" because it was "required" to by the contract.

its responsibility under it is not alone that of a constituent of the Council. That contract was in effect at times material herein until its termination on April 30, 1958, and contained none of the hiring hall safeguard provisions set out by the Board in *Mountain Pacific*.[5] Accordingly, we find that Local 4172 violated Section 8(b)(2) and (1)(A) of the Act by executing said contract and maintaining it during its term.[6]

THE REMEDY

The Trial Examiner, noting that the objectionable contract provisions were corrected within the widely publicized moratorium period, did not recommend application of the *Brown-Olds* remedy[7] partly because of the exchange of correspondence set forth in the Intermediate Report between the Board's then General Counsel Fenton and President Gray of the Building Construction Trades Department of the AFL-CIO, plus the fact that the present General Counsel is not now seeking application of the remedy in this case. In view of the good faith demonstrated by the parties in revising their contracts during the said March 1 to November 1, 1958 period, the Board, pursuant to sound public policy, will not impose the reimbursement remedy.

Respondent Brotherhood excepts particularly to the recommendation of the Trial Examiner that publication of the recommended notice be made in "official publications of general circulation among members" on the ground that publication outside the State of Montana is unnecessary. We find no merit in this exception inasmuch as the Brotherhood has been involved in other proceedings before this Board involving the application of its closed shop contract

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[5] 119 NLRB 883.

[6] See *Funeral Directors of Greater St. Louis, etc.*, 125 NLRB 241.

[7] *Brown-Olds Plumbing and Heating Corporation*, 115 NLRB 594.

in various parts of the United States.[5] In addition, its very contract here in question applies to the Company's construction projects throughout the country.

ORDER

Upon the entire record in the case, and pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that Respondent United Brotherhood of Carpenters and Joiners of America, the Montana State Council of said organization as well as Local 1172 thereof, and the officers, agents, representatives, successors and assigns of each said Respondent, shall:

A. Cease and desist from:

(1) Executing, performing, maintaining or otherwise giving effect to provisions of any agreement or understanding with The Refinery Engineering Company, or Montana Contractors Association, Inc., and its employer members, or with any other employer whose operations affect commerce within the meaning of the Act which conditions the hire of employees or the retention of their employment upon clearance or approval by any of the Respondent Unions or by any other labor organization, unless such referral system explicitly provides for the minimum safeguards stated in *Mountain Pacific Chapter of the Associated General Contractors*, 119 NLRB 883.

(2) Performing, maintaining or otherwise giving effect to provisions of any agreement or understanding with The Refinery Engineering Company or Montana Contractors Association, Inc., and its employer members, or with any other employer whose operations affect commerce within the meaning of the Act which conditions the hire of employees upon membership in any of the Respondent Unions

[5] See cases cited in ftn. 1; See also The *H.K. Ferguson Company*, 124 NLRB 544.

or subservience to its policies, or conditions the retention of employees in employment upon membership in any of the Respondent unions or subservience to its policies except to the extent that membership therein as the condition of continuing in employment may be required on or after 30 days by an agreement permitted by the proviso to Section 8(a)(3) of the Act, as modified by the Labor Management Reporting and Disclosure Act of 1959.

(3) In any like or related manner, restraining or coercing employees in the exercise of their rights guaranteed by Section 7 of the Act, including the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and also the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8(a)(3) of the Act, as modified by the Labor Management Reporting and Disclosure Act of 1959.

B. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(1) Post at their respective offices in all locations where notices to members are customarily posted, and publish in their official publications of general circulation among members, copies of the notice hereto attached marked Appendix.[9] Copies of said notice, to be furnished by the Regional Director for the Nineteenth Region, Seattle, Washington, shall, after being duly signed by representatives, respectively, of Brotherhood, Council, and Local 1172, be posted by them immediately upon receipt thereof

[9] In the event this Order is enforced by a decree of the United States Court of Appeals, there shall be substituted for the words "PURSUANT TO A DECISION AND ORDER" the words "PURSUANT TO A DECREE OF THE UNITED STATES COURT OF APPEALS, ENFORCING AN ORDER."

and conspicuously maintained by them for a period of sixty (60) consecutive days thereafter in all places where notices to members are customarily displayed in their respective offices. Reasonable steps shall be taken by the Respondents to insure that said notices are not altered, defaced, or covered by other material. Also the said notices after having been duly signed as directed above, shall be published by the Respondents respectively in the next succeeding issue of whatever publications are normally issued by them and distributed generally among their respective memberships.

(2) Additional copies of the said notice herein marked Appendix, to be furnished by the Regional Director of the Nineteenth Region, shall be signed by a representative of each Respondent and forthwith returned to the said Regional Director. These notices shall be posted, Refinery and Montana Contractors willing, in places where notices to employees of Refinery and members of Montana Contractors covered by Respondents' contracts found herein to have incorporated unlawful union security provisions, are customarily posted.

(3) Notify the Regional Director for the Nineteenth Region in writing within ten (10) days from the date of this Order what steps have been taken in compliance.

Dated, Washington, D. C., Feb. 16, 1961.

PHILIP RAY RODGERS,
Member

JOSEPH ALTON JENKINS,
Member

JOHN H. FANNING,
Member

NATIONAL LABOR RELATIONS BOARD

(SEAL)

APPENDIX

TO ALL MEMBERS OF UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AND OF LOCAL UNIONS AFFILIATED WITH MONTANA STATE COUNCIL OF UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, including LOCAL 1172

PURSUANT TO

A DECISION AND ORDER

of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, we hereby notify our members that:

WE WILL NOT, jointly or severally, execute, perform, maintain or otherwise give effect to provisions of any agreement or understanding with THE REFINERY ENGINEERING COMPANY, or MONTANA CONTRACTORS ASSOCIATION, INC., and its employer members, or with any other employer whose operations affect commerce within the meaning of the Act, which conditions the hire of employees or the retention of their employment upon clearance or approval by any of us unless that agreement or arrangement explicitly provides that: (1) Selection of applicants for referral to jobs shall be on a nondiscriminatory basis and shall not be based on, or in any way affected by, union membership, bylaws, rules, regulations, constitutional provisions, or any other aspect or obligation of union membership, policies, or requirements; (2) the employer retains the right to reject any job applicant who we may refer; and (3) all parties to the agreement or arrangement post in places where notices to employees and job applicants are customarily posted all provisions relating to the functioning of the hiring arrangement, including these provisions.

WE WILL NOT, jointly or severally, enter into, maintain or enforce any contract, agreement, understanding, or practice, with THE REFINERY ENGINEERING COMPANY, MONTANA CONTRACTORS ASSOCIATION, INC., or any other employer over whom the Board will assert jurisdiction which requires employees or prospective employees to obtain job referrals or permits, or which unlawfully conditions the hire of applicants for employment or retention of employees in employment by such employers or any other employer, upon clearance or approval by us, jointly or severally, except as authorized by Section 8(a)(3) of the Act, as modified by the Labor Management Reporting and Disclosure Act of 1959.

WE WILL NOT, jointly or severally, in any like or related manner restrain or coerce employees or prospective employees of THE REFINERY ENGINEERING COMPANY, MONTANA CONTRACTORS ASSOCIATION, INC., or any other employer, in the exercise of the rights guaranteed in Section 7 of the Act, except to the extent that such rights may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized by Section 8(a)(3) of the Act, as modified by the Labor Management Reporting and Disclosure Act of 1959.

Signed copies of this notice have been mailed to the National Labor Relations Board's Regional Director for the Nineteenth Region for posting by The Refinery Engineering Company and employer members of Montana Contractors Association, Inc., maintaining contractual relations

with us, the said employers willing, in all locations where notices to their employees are customarily posted.

UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA

Dated ..... By .....
(Representative) (Title)

MONTANA STATE COUNCIL OF THE BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA

Dated ..... By .....
(Representative) (Title)

BILLINGS LOCAL NO. 1172 OF UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA

Dated ..... By .....
(Representative) (Title)

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

APPENDIX E

133 NLRB No. 44 D-2297
Billings, Mont.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

Dated Sept. 26, 1961

Case No. 19-CB-518

BILLINGS LOCAL NO. 1172 OF UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, and MONTANA STATE COUNCIL OF THE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA

and

UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA

and

Case No. 19-CB-530

ANTHONY OCEPEK, An Individual

and

THE REFINERY ENGINEERING COMPANY, BILLINGS CONTRACTORS COUNCIL, INC., and MONTANA CONTRACTORS ASSOCIATION, INC.,

Parties to the contracts

Supplemental Decision and Order

On February 16, 1961, the Board entered its Decision and Order in this proceeding[1] in which it found that the Respondents had violated Section 8(b)(2) and (1)(A) of the Act in that Respondent Brotherhood had maintained its closed shop contract with the Company during the period in question, and Respondent Council and Respondent Local

[1] 130 NLRB No. 19.

had maintained a hiring hall agreement with the Montana Contractors Association during the period in question which contained none of the hiring hall safeguard provisions set out by the Board in *Mountain Pacific Chapter of the Associated General Contractors*, 119 NLRB 883.

Since issuance of the Board's Decision and Order in this proceeding, the Supreme Court of the United States has, in *Local 357, International Brotherhood of Teamsters* v. *N.L.R.B.*[2] denied enforcement of a Board order involving application of the so-called *Mountain Pacific* standards.

We have carefully reexamined and reconsidered the entire record in this case in the light of the Supreme Court's decision, and, in view of the paucity of testimony concerning operation of the hiring hall in question, hereby vacate that portion of our Decision and Order having to do with the hiring hall arrangements in effect between the Montana Contractors Association and Respondent State Council and its constituent locals, including Respondent Local 1172. We reaffirm that portion of our Decision and Order having to do with the illegal closed shop contract existing between the Company and the Respondent Brotherhood during the six month period prior to the filing of charges herein until terminated on August 20, 1958, and the remedy already ordered in that connection.[3]

---

[2] 365 U.S. 667.

[3] Member Brown would dismiss the entire case for the following reasons: The Supreme Court's aforementioned decision has removed the principal theory upon which this case was tried, and the only remaining aspect of the original case concerns the alleged invalidity of a contract which was superseded in or before August 1958 during the "moratorium" mentioned by the Trial Examiner. There is no showing of individual discrimination during the operative period of the contract, nor is there any claim of discrimination since the contract was superseded. Upon consideration of these circumstances, and wholly apart from reservations that the disputed contract is unlawful (see Member Murdock's dissenting opinion in *Marley Company*, 117 NLRB 107, 119-122), Member Brown considers further proceedings unwarranted.

ORDER

Upon the entire record in the case, and pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that Respondent United Brotherhood of Carpenters and Joiners of America, its officers, agents, representatives, successors and assigns, shall:

A. Cease and desist from:

(1) Executing, performing, maintaining or otherwise giving effect to provisions of any agreement or understanding with The Refinery Engineering Company, or with any other employer whose operations affect commerce within the meaning of the Act, which conditions the hire of employees or the retention of their employment upon membership in the Respondent Union except to the extent that membership therein as the condition of continuing in employment may be required on or after 30 days by an agreement permitted by the proviso to Section 8(a)(3) of the Act, as modified by the Labor Management Reporting and Disclosure Act of 1959.

(2) In any like or related manner, restraining or coercing employees in the exercise of their rights guaranteed by Section 7 of the Act, except as authorized by Section 8(a)(3) of the Act as amended.

B. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(1) Post at its offices in all locations where notices to members are customarily posted, and publish in its official publications of general circulation among members, copies of the notice hereto attached marked Appendix.[4] Copies

[4] In the event this Order is enforced by a decree of the United States Court of Appeals, there shall be substituted for the words "PURSUANT TO A DECISION AND ORDER" the words "PURSUANT TO A DECREE OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER."

of said notice, to be furnished by the Regional Director for the Nineteenth Region, Seattle, Washington, shall, after being duly signed by representatives of Respondent Brotherhood, be posted by it immediately upon receipt thereof and conspicuously maintained by it for a period of sixty (60) consecutive days thereafter in all places where notices to members are customarily displayed in its offices. Reasonable steps shall be taken by the Respondent to insure that said notice is not altered, defaced, or covered by other material. Also the said notice after having been duly signed as directed above, shall be published by the Respondent in the next succeeding issue of publications normally issued by it and distributed generally among its membership.

(2) Additional copies of the said notice herein marked Appendix, to be furnished by the Regional Director of the Nineteenth Region, shall be signed by a representative of the Respondent Brotherhood and forthwith returned to the said Regional Director. These notices shall be posted—Refinery willing—in places where notices to employees of Refinery, covered by Respondent's contract found herein to have exceeded lawful union security provisions, are customarily posted.

(3) Notify the Regional Director for the Nineteenth Region in writing within ten (10) days from the date of this Order what steps have been taken in compliance.

The complaint herein is hereby dismissed insofar as it alleges the existence of an unlawful hiring hall arrangement and practice within the six-month period prior to filing of charges herein until terminated on April 30, 1958, between Respondent State Council and its constituent local

unions in Montana, including Respondent, Local 1172, and the Montana Contractors Association.

Dated, Washington, D. C., Sept. 26, 1961.

PHILIP RAY RODGERS,
Member

JOHN H. FANNING,
Member

GERALD A. BROWN,
Member

NATIONAL LABOR RELATIONS BOARD

(SEAL)

APPENDIX

TO ALL MEMBERS OF UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA

PURSUANT TO

A DECISION AND ORDER

of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, we hereby notify our members that:

WE WILL NOT enter into, maintain or enforce any contract, agreement, understanding, or practice with THE REFINERY ENGINEERING COMPANY, or any other employer over whom the Board will assert jurisdiction, which unlawfully conditions the hire of applicants for employment or retention of employees in employment by such employer upon clearance or approval by us, except to the extent that membership as the condition of continuing in employment may be required on or after 30 days by an agreement permitted by the proviso to Section 8(a)(3) of the Act, as modified by the Labor Management Reporting and Disclosure Act of 1959.

WE WILL NOT in any like or related manner restrain or coerce employees of THE REFINERY ENGINEERING COMPANY, or any other employer, in the exercise of rights guaranteed in Section 7 of the Act, except as authorized by Section 8(a)(3) of the Act as amended.

Signed copies of this notice have been mailed to the National Labor Relations Board's Regional Director for the Nineteenth Region for posting by The Refinery Engineering Company, the said employer willing, in all locations where notices to their employees are customarily posted.

UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA

Dated ..... By .....
(Representative) (Title)

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

INDEX

	Page
Opinions below	1
Jurisdiction	2
Question presented	2
Statute involved	2
Statement	2
A. The Board's findings of fact	2
B. The Board's conclusions and order	7
C. The decision of the court of appeals	7
Argument	7
Conclusion	11
Appendix	12

CITATIONS

Cases:

International Association of Heat and Frost Insulators, Local 31, 111 NLRB 1526, enforced, 261 F. 2d 347	8
International Association of Heat & Frost Insulators, Local 47, 118 NLRB 79, enforced, 254 F. 2d 955	8
International Typographical Union, 86 NLRB 951	7
International Typograpical Union & Chicago Typographical Union No. 16, 87 NLRB 1418, enforced *sub nom. American Newspaper Publishers Association* v. *National Labor Relations Board*, 193 F. 2d 782, certiorari denied, 344 U.S. 812	8
Local 420, United Association of Journeymen, 111 NLRB 1126, enforced, 239 F. 2d 327	8
Marley Co., The, 117 NLRB 107	9
Mechanical Handling Systems, 122 NLRB 396, enforced *sub nom. National Labor Relations Board* v. *Local 60, United Brotherhood of Carpenters, etc.*, 273 F. 2d 699, reversed, 365 U.S. 651	9

Cases—Continued Page

Millwrights' Local 2232 (Farnsworth & Chambers, Inc.), 122 NLRB 300, enforced, 277 F. 2d 217 9
National Labor Relations Board v. *Mexia Textile Mills*, 339 U.S. 563 9
Teamsters Local 135, 117 NLRB 635, enforced, 267 F. 2d 870, certiorari denied, 361 U.S. 914 8

Statute:

National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*)
Section 7 6, 10, 12
Section 8(a)(3) 6, 12
Section 8(b)(1)(A) 6, 12-13
Section 8(b)(2) 6, 12-13
Section 10(c) 7, 13

Miscellaneous:

Directory of National and International Labor Unions in the United States, 1961, Bull. No. 1320, Dept. of Lab., Bur. Lab. Stat. 17 (1962) 3

In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 535

UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 5a-10a) is reported at 321 F. 2d 126. The original Decision and Order of the National Labor Relations Board (R. 76-94, 112-120; Pet. App. 43a-53a, 11a-42a) [1] are reported at 130 NLRB 307, and its Sup-

[1] "R." references are to the "Volume I, Pleadings" in the court below.

plemental Decision and Order (R. 121-125; Pet. App. 54a-59a) at 133 NLRB 358.

JURISDICTION

The judgment of the court of appeals (Pet. App. 1a-3a) was entered on August 6, 1963. The petition for certiorari was filed on October 10, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the National Labor Relations Board, upon finding that an international union had entered into an illegal closed shop contract with a construction firm covering projects throughout the country and that the union previously had entered into similar illegal arrangements with other employers, could properly order the union to publish in one issue of its journal circulated among its members a notice that it will cease and desist from the illegal conduct found.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act are set forth in the Appendix, *infra*, pp. 12-13.

STATEMENT

A. The Board's Findings of Fact

Petitioner, United Brotherhood of Carpenters, is an international union which has locals throughout

the United States.[2] Refinery Engineering Company, with its main office at Tulsa, Oklahoma, was engaged, at the time material here, in substantial construction work in nine different states ranging from Texas to New Jersey, including the construction of a refinery at Laurel, Montana, near Billings (R. 77; G.C. Exh. 8, pp. 4, 20, and Exhibit B).

On May 4, 1956, the Company and the Brotherhood entered into a written contract entitled "International Agreement," applicable anywhere in the country, which contained the following provision (R. 74):

> We, [the Company], agree to recognize the jurisdiction claims of [the Brotherhood], to work the hours, pay the wages and abide by the rules and regulations established or agreed upon by the United Brotherhood of Carpenters and Joiners of America of the locality in which any work of our company is being done, and employ members of the [Brotherhood].

On March 14, 1956, Billings Local 1172 of the Brotherhood, which has jurisdiction over the area of the Laurel Refinery project, had entered into a two-year agreement with Billings Contractors, Inc., an association of building and construction firms in the area (R. 77-78, 80). The agreement contained the following provisions (R. 24, 25):

> The party of the first part [Billings Contractors] hereby agrees to employ only such members of

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[2] See *Directory of National and International Labor Unions in the United States*, 1961, Bull. No. 1320, Dept. of Lab., Bur. Lab. Stat. 17 (1962). The Brotherhood's headquarters were at Indianapolis, Indiana, but are now at Washington, D.C.

the party of the second part who are in good standing with the party of the second part, or who shall signify their intentions to become members and make applications for membership. Party of the second part agrees to hold employers harmless against any loss which may accrue to them in any manner through the operation of this paragraph.

* * * *

ARTICLE 4

There shall be a Shop Steward appointed by the party of the second part, and it shall be the duty of the Shop Steward to see that only members of the party of the second part are in good standing and * * * the Shop Steward * * * shall * * * report any and all violations of this agreement to both parties interested.

The "By-Laws and Trade Rules" of Local 1172 then in effect provided, *inter alia*, that a non-union man may be permitted on a job only if "he gives a cash guarantee that he will join the Local Union," in which case he must give the union a wage assignment unless he can furnish at least $10 (R. 80; R. 22, p. 16); and that a member of Local 1172 shall act as steward on each job, and shall satisfy himself that every carpenter on the job has a current working card (R. 80; R. 22, pp. 20-21).

On April 14, 1958, a charge was filed against the Brotherhood by a worker at the Company's Laurel project, alleging that the International Agreement and the local hiring arrangements implementing it restricted employment to union members, in violation

of the Act (R. 5.) On April 21, 1958, the Company wrote the Brotherhood that it had "terminated" the agreement as of that date. On May 15, the Brotherhood replied that it would "make recommendations on the necessary changes required in [its] International Agreement and would submit a draft of a new International Agreement to its General Executive Board at an early date" (G.C. Exh. 8, pp. 6-7, G.C. Exh. 20, Exhibit A). On July 9 the Company inquired as to the "recommendations on necessary changes to legalize the hiring procedures section of the contract," and added that the business agent of the Local at Perth Amboy, New Jersey, had taken the position that the Company was not under contract with the Brotherhood (G.C. Exh. 20, Exh. C). On July 14, the Brotherhood informed its Perth Amboy Local that the "Company did enter into an International Agreement with our Brotherhood on May 4, 1956, *which is still in effect*" (G.C. Exh. 20, Exh. D, emphasis supplied).

On or about August 20, 1958, the Company and the Brotherhood entered into a new labor agreement. At that time the Brotherhood advised the Company that the "old agreement which was signed sometime ago * * * is no longer effective." (R. 78; R. 75, G.C. Exh. 1D, G.C. Exh. 20, Exhibit G.)

B. The Board's Conclusions and Order

Upon the foregoing facts, the Board (one Member dissenting) concluded that the 1956 "International Agreement" between the Brotherhood and the Com-

pany, as implemented by the agreement between Local 1172 and the Billings contractors and the working rules and regulations of the Local, had the effect of conditioning employment on union membership. Accordingly, the Board held that the Brotherhood, by maintaining this contractual arrangement with the Company, violated Sections 8(b)(2) and (1)(A) of the Act (R. 78, 80, 113, 122; Pet. App. 44a, 54a-55a.)

The Board ordered the Brotherhood to cease and desist from performing, maintaining, or enforcing any agreement or understanding with the Company or any other employer which requires union membership as a condition of employment, except as authorized by Section 8(a)(3) of the Act, and from restraining employees in any like or related manner in the exercise of their rights guaranteed in Section 7 (R. 122; Pet. App. 56a, 122). Affirmatively, the Board required the Brotherhood to post notices—setting forth the terms of the cease and desist order and its agreement to abide thereby—in all locations where notices to its members are customarily posted, and, subject to the Company's approval, in places where the Company customarily posts notices to the employees. Moreover, the Brotherhood was directed to publish the notice in the next succeeding issue of publications normally issued by it and distributed generally among its membership. (R. 123; Pet. App. 56a-57a.)

Rejecting the contention that it was unnecessary to provide for publication outside the State of Mon-

tana, the Board pointed out that "the Brotherhood has been involved in other proceedings before this Board involving the application of its closed shop contract in various parts of the United States [citing cases]. In addition, its very contract here in question applied to the Company's construction projects throughout the Country." (R. 115; Pet. App. 47a-48a).

C. The Decision of the Court of Appeals

The court below (per Madden, J.) held that the Board's findings were supported by substantial evidence and that the requirement for publication of the Board notice in a publication which the Brotherhood generally distributed to its membership was reasonable in light of the circumstances involved. Accordingly, the court enforced the Board's order in full (Pet. App. 5a-10a.)

ARGUMENT

1. Petitioner does not attack the findings of the Board, approved by the court below, that it violated the closed shop provisions of the Act. Nor does it deny (see Pet. 13) that the Board, under the broad remedial authority conferred by Section 10(c) of the Act, has power to require that a union respondent publish the Board's notice in a journal generally circulated among its members.[3] Petitioner's sole con-

[3] Publication requirements of the type here have frequently been enforced by the courts. See, *e.g.*, *International Typographical Union*, 86 NLRB 951, 963, and *International Typo-*

tention is that this is not an appropriate case for imposing such a requirement. A narrow issue of this kind, which turns on the particular facts, does not warrant review by this Court.

2. In any event, it was clearly within the Board's power to impose a publication requirement in this case. Refinery Engineering, the contracting employer, maintains its home office in Oklahoma and undertakes construction projects throughout the United States. Its labor agreement with petitioners was not limited geographically but was intended to cover Company employees wherever they were working. Under these circumstances, as the court below properly found (Pet. App. 9a):

> It would be futile to require only the posting of this notice in the national headquarters of [the] Union, or even to supplement the posting requirement with an order for publication limited to the State of Montana where the instant unfair practice occurred, for only a small portion of the workers potentially affected would be reached.

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graphical Union & Chicago Typographical Union No. 16, 87 NLRB 1418, 1426, enforced *sub nom. American Newspaper Publishers Association* v. *National Labor Relations Board*, 193 F. 2d 782 (C.A. 7), certiorari denied, 344 U.S. 812; *Teamsters Local 135*, 117 NLRB 635, 637, enforced, 267 F. 2d 870, 874 (C.A. 7), certiorari denied, 361 U.S. 914; *Local 420, United Association of Journeymen*, 111 NLRB 1126, 1128, enforced, 239 F. 2d 327 (C.A. 3); *International Association of Heat and Frost Insulators, Local 31*, 114 NLRB 1526, 1529, enforced, 261 F. 2d 347 (C.A. 1); *International Association of Heat & Frost Insulators, Local 47*, 118 NLRB 79, 84-85, enforced, 254 F. 2d 955 (C.A. D.C.).

Moreover, the Board properly took notice of the fact that petitioner had been found by the Board and the courts to have violated the closed shop provisions of the Act on several prior occasions,[4] and concluded from this history that, unless adequate notice was given of the Board's order, these unlawful activities might continue or be resumed.

3. There is no merit to petitioner's contention that publication of the notice is unnecessary, and serves only punitive purposes (Pet. 9-11). The contention rests on the assumption that, since the unfair labor practices were committed several years ago and petitioner has since discontinued its illegal conduct, there is no need for apprising the union members that closed shop conditions are no longer being enforced, or, if there is such a need, that it could adequately

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[4] *The Marley Co.*, 117 NLRB 107 (a nationwide company with headquarters in Kansas City); *Mechanical Handling Systems*, 122 NLRB 396, 406-407 (a Michigan corporation also engaged in business in Indiana), enforced *sub nom. National Labor Relations Board* v. *Local 60, United Brotherhood of Carpenters, etc.*, 273 F. 2d 699 (C.A. 7), reversed on other grounds, 365 U.S. 651; *Millwrights' Local 2232 (Farnsworth & Chambers Inc.)*, 122 NLRB 300, 309 (a large construction company doing business in Texas and 10 other states), enforced *sub nom. National Labor Relations Board* v. *Millwrights' Local 2232*, 277 F. 2d 217 (C.A. 5). Contrary to petitioner's contention (Pet. 11-12), these cases are not insignificant but were indicative of a general pattern of illegal closed shop practices at the time of the commission of the present violation. Nor can *Millwrights' Local 2232* be distinguished on the ground that the International Agreement was not directly involved; for it was found that the international union had mandated the enforcement of closed shop provisions by its constituent locals (see 277 F. 2d at 220-222).

be satisfied by the lesser requirement of posting the notices in petitioner's offices. It is well settled that the cessation of unfair labor practices does not bar a Board remedy. *National Labor Relations Board* v. *Mexia Textile Mills*, 339 U.S. 563. Accordingly, no inference of a punitive purpose on the Board's part can be drawn from the circumstance that the Board has imposed a notification requirement though the illegal contract is no longer in effect. Nor can such inference be drawn from the circumstance that the Board required the notice to be published in a journal of general circulation instead of merely requiring it to be posted at petitioner's headquarters. With petitioner's headquarters located in Washington, D.C., and its members covered by contract with the Company working throughout the United States, a posting in Washington alone would, as the court below found (*supra*, p. 8), have been a "futile" requirement.

Similarly, there is no substance to petitioner's further contention that publication in petitioner's journal would be harmful and confusing (Pet. 12-13). The notice to be published is exactly the same as the notice required to be posted at petitioner's headquarters, and it is in the customary form of Board notices. Following the form of the Board's cease and desist order, it merely asserts that petitioner will not enter into or maintain any contract with the Company or any other employer which unlawfully conditions employment upon union membership, or in any like or related manner restrain or coerce the employees of the Company or any other employer in the exercise of their Section 7 rights (Pet. App. 58a-59a). It is

inconceivable that such a notice, which need be published only once, would cause the employees to question the validity of any current contract which contains no illegal union security provisions.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

ARCHIBALD COX,
Solicitor General.

ARNOLD ORDMAN,
General Counsel,

DOMINICK L. MANOLI,
Associate General Counsel,

NORTON J. COME,
Assistant General Counsel,

HANS J. LEHMANN,
Attorney,

National Labor Relations Board.

NOVEMBER 1963.

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Secs. 151, *et seq.*) are as follows:

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

Sec. 8.(a) It shall be an unfair labor practice for an employer—

* * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8 (a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later * * *.

* * * * *

(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: * * *

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

* * * * *

Sec. 10 * * *

(c) * * * If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: * * *

☆ U. S. GOVERNMENT PRINTING OFFICE: 1963 711864: 369